Supreme Court, U.S.
FILED

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No.

IN THE
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1998**

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MAURICE G. WOODS and
TERESA J. WOODS

Petitioners,

v.

THOMAS J. KENAN, Trustee

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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**July 9, 1999**

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## QUESTIONS PRESENTED FOR REVIEW

1. May a Chapter 11 bankruptcy case be reopened, or have an order closing the case vacated, to sell debtors' scheduled property once part of the bankruptcy estate when § 554(c) of the Bankruptcy Code provides, "Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title"?

2. May general equitable principles be utilized to circumvent specific legislative provisions of the U.S. Bankruptcy Code?

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**Federal Statutes:**
11 U.S.C § 105 (a)
11 U.S.C. § 554

**Legislative History:**

H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 92 (1978)

## OPINIONS BELOW

The opinion of the three-judge panel of the United States Court of Appeals for the Tenth Circuit is reported in the Federal Reporter as *Woods v. Kenan*, ___ F. 3d. ___ (10th Cir., April 13, 1999). The Tenth Circuit heard oral argument in the case on March 9, 1999 and rendered its decision on April 13, 1999. No Petition for Rehearing was filed. Petitioners appealed an Order of the United States Bankruptcy Appellate Panel for the Tenth Circuit Court of Appeals in *Woods v. Kenan*, 215 B.R. 623, 626 (B.A.P. 10th Cir. 1998). The B.A.P. heard oral arguments and issued its opinion on January 20, 1998. Therein, the Woods had appealed an unreported decision of the United States Bankruptcy Court for the Western District of Oklahoma.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit has entered a judgment in this case in a manner that is inconsistent with the reported holdings of various United States Court of Appeals Bankruptcy Appellate Panels, including the First and Ninth Circuit, various Bankruptcy Courts, and in a manner that is inconsistent with prior relevant holdings of this Court. This matter involves interpretation of the statutory provision contained in 11 U.S.C. § 554(c), and is an important question of Federal law that should be settled by this Honorable Supreme Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS and RULES INVOLVED

Section 554 of the Bankruptcy Code provides:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate;
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> **(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of 350 of this title;**
>
> (d) Unless the court orders otherwise, any property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

Section 105 of the Bankruptcy Code, provides in pertinent part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude

> the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> . . .

## STATEMENT OF THE PROCEEDINGS BELOW

The Woods filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Western District of Oklahoma on December 17, 1984. Among the assets of the estate were dozens of fractional interests in oil and gas properties. On May 1, 1987, Thomas J. Kenan was appointed Trustee of the Woods' Chapter 11 estate. It was not until July 10, 1991 that the Bankruptcy Court confirmed a plan of reorganization promulgated by the Trustee.

On April 21, 1993, Thomas J. Kenan, as post-confirmation Trustee, pursuant to the plan of reorganization, moved the Bankruptcy Court to enter an order approving the sale of some of the oil and gas wells contained in the Woods' Chapter 11 Bankruptcy estate. Prior to completing the sale, however, on May 13, 1993, Trustee filed his Final Report and requested that the Bankruptcy Court enter a Final Decree. (See, Appendix B to Petition). On June 4, 1993, the Bankruptcy

Court entered a Final Decree and closed this case. (See, Appendix C to Petition).

Trustee represented to the Bankruptcy Court in his Application for Final Decree and Final Decree that, "[T]he property proposed by the plan to be transferred has been substantially transferred," and, "the estate of the above named debtors has been fully administered. . . ." (See, Appendix B to Petition). Pursuant to the Final Decree, Mr. Kenan was discharged as Trustee and Mr. Kenan requested that his Trustee's bond be exonerated. (See, Appendix C to Petition).

The confirmed plan of reorganization, approved by the Bankruptcy Court in 1991 provided that, "Until the case is closed, the Bankruptcy Court shall retain jurisdiction to insure that the purpose and intent of this Plan is carried out." (emphasis added)(See, Appendix F to Petition). The case was closed on June 4, 1993. (See, Appendix C to Petition).

Subsequent to closing this case, on July 15, 1993, Trustee, without jurisdiction of the Bankruptcy Court or authority as Trustee, filed a Further Description of additional oil and gas properties once contained in the Woods' Chapter 11 estate which he proposed to sell. On August 18, 1993, having lost jurisdiction of the case, the Bankruptcy Court, nonetheless, entered an order Approving the Sale of Oil and Gas Properties to the Packard Partners of Midland, Texas.

After Trustee began executing Mineral Deeds to the Packard Partners covering both oil and gas properties included in his April 21, 1993 "Notice" and his July 15, 1993, "Further Description," the Woods began challenging his authority to do so by writing letters to the various oil and gas producers. The Woods' assertion at that time, and which has continued to the very date of this Petition, is that pursuant to 11 U.S.C. §554(c),

the oil and gas properties were abandoned to them upon closing of this case June 4, 1993.

Some two years later, because of the Woods' challenge, and the fact that the Bankruptcy Court's order of sale post-closing was void for lack of jurisdiction, Trustee moved to reopen the Woods' Chapter 11 case with the intent to sell the oil and gas properties while the Bankruptcy Court had jurisdiction. After objection by the Woods, and a hearing on the issue, the Bankruptcy Court entered an order reopening the case on August 30, 1995. (See, Appendix E to Petition). The Woods' appealed that order to the United States District Court for the Western District of Oklahoma and, ultimately, to the Tenth Circuit Court of Appeals. The Tenth Circuit dismissed the appeal for lack of jurisdiction, finding the order reopening this case not to be a "final order." *In re Woods*, No. 96-6181, slip. Op. (10th Cir. Feb. 7, 1997)

Soon afterwards, on March 6, 1997, Trustee filed his most recent Motion to Approve Sale of the same oil and gas properties previously described before the case was closed on April 21, 1993, after the case was closed on July 15, 1993, and additional properties never before included in any previous notice of sale. The Woods filed an Objection to Trustee's Motion on the grounds, *inter alia*, that the oil and gas properties had been irrevocably abandoned to the debtors upon closing of the case June 4, 1993.

The Bankruptcy Court heard evidence on these matters April 24, 1997, and at the conclusion of that hearing, during the Bankruptcy Court's findings of fact and conclusions of law, cited its previous decision of August 30, 1995, and recognized that many of the grounds on which the Woods were objecting were similar to those argued August 30, 1995. The Bankruptcy Court found that the first clause of § 554(c) was an example of

a discreet type statute, stating, "Again, it's saying unless the Court orders otherwise. That, again, is one of these discrete [sic] type statutes that leaves it up to the Court. It's just open-ended. There's no absolute rule contained there."

Additionally, the Bankruptcy Court focused on the equitable nature of section 105(a) of the Bankruptcy Code, and Rule 60 Federal Rules of Civil Procedure as adopted by the Federal Rules of Bankruptcy Procedure in Rule 9024. Applying that section and rule, the court made its ruling upon the equitable considerations of a technical abandonment under 11 U.S.C. § 554(c). The most indicative statement by the Bankruptcy Court was, "it appears to me that if somehow these debtors were to end up with these properties....it would just be an absolute, total...windfall contrary to any concept or principle of equity that I've ever heard about."

On May 20, 1997, the Bankruptcy Court entered its order confirming the sale of the oil and gas properties and overruling the Debtors' Objection, *inter alia*.

## ARGUMENT

### I.

### THE LANGUAGE AND LEGISLATIVE HISTORY OF 11 U.S.C. §554(c) IS CLEAR AND UNAMBIGUOUS, AND UPON CLOSING OF A BANKRUPTCY CASE, ALL SCHEDULED PROPERTY NOT OTHERWISE DISPOSED OF IS ABANDONED TO THE DEBTORS

The confirmed plan of reorganization, approved by the Bankruptcy Court in 1991 provided that, "**Until the case is closed**, the Bankruptcy Court shall retain jurisdiction to insure that the purpose and intent of this Plan is carried out." (See,

Appendix F to Petition). The case was closed on June 4, 1993 and pursuant to 11 U.S.C. 554(c), closing the case had a very specific effect.

The Bankruptcy Court interpreted section 554(c) as follows:

> "Again, it's saying unless the court orders otherwise. That, again, is one of these discrete [sic] type statutes that leaves it up to the Court. It's just open-ended. There's no absolute rule contained there."

However, the Tenth Circuit Court of Appeals found no ambiguity in the operation of the statute and held:

> "When the Woods' case was closed on June 3, 1993, the contested properties were abandoned to the Woods by operation of law and were deemed fully administered. . . Under §554(c), a technical abandonment is necessarily the effect of the closing order, regardless of the trustee's intentions."

The Tenth Circuit then framed the "crucial issue" to be:

> ". . . whether and under what circumstances the technical abandonment was revocable."

In discussing the matter, the Tenth Circuit recognized that at least three approaches have been taken by various reported decisions of United States Court of Appeals Bankruptcy Appellate Panels and Bankruptcy Courts. (See, Appendix A, pgs 10a-14a to Petition). The variance in application between circuits and multiple interpretations of this federal statute warrant this Court's final resolution.

**A. The Text of the Statute is Clear. Revoking the Abandonment is Contrary to Statute.**

Statutory interpretation begins with the language of the statute itself. Pennsylvania Dept. of Public Welfare v. Davenport, 110 S.Ct. 2126, 109 L.Ed.2d 588, (1990); Mallard v. U.S. Dist. Court for Southern Dist. of Iowa, 409 U.S. 296, 300, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318, 326 (1989). The rationale for starting with the language of the statute is "there is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." United States v. American Trucking Assns., Inc., 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345, 1350-51 (1940); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

Section 554(c) of the Bankruptcy Code provides:

> "Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title."

This provision sets up a simple procedure for determining the status of assets upon closing of the case. Either the court makes a specific order relative to the property before the case is closed, or it is abandoned to the debtor. The text does not specify what the court may order, but it clearly specifies the result if there is no order.

Generally, courts employ a two part analysis in construing statutes. Beginning with the language of the statute,

the first inquiry is whether Congress has spoken on the matter. Norfolk and Western Ry. Co. v. American Train Dispatchers Assn., 111 S.Ct. 1156 (1991).

Second, if Congress has spoken, is what Congress said clear and unambiguous? If the intent of Congress is clear, that is the end of the inquiry because the court must give effect to the unambiguously expressed intent of Congress. Norfolk and Western Ry. Co. at 1163. The plain meaning of legislation should be conclusive, except in rare cases in which literal application of a statute will produce results demonstrably at odds with the intention of its drafters. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290, 299 (1989).

Congress has spoken. Congress has directed the legal effect when no order is entered relative to scheduled property upon closing of the case: "[it] is abandoned to the debtor and administered for purposes of section 350 of this title." This language is unambiguous. The text has an almost mathematical precision; unless O, then C = A (where O = order, C = closing of case, and A = abandonment). The text is expressed in absolute terms and Congress has not allowed for any exceptions. No order to the contrary was entered. Therefore, the properties were abandoned to the debtors and administered for purposes of § 350 of Title 11.

The revocation produced by vacating the closing order of the Bankruptcy Court is directly at odds with the intention of the drafters. The intention of the drafters is clearly expressed in the text itself. Legislative history confirms such intent.

**B. Legislative History of Section 554(c) is Clear.**

While legislative history is often used to determine

statutory purposes hidden by ambiguity, the language of the statute itself must ordinarily be treated as conclusive, absent any clear legislative intent to the contrary. Burlington Northern R. Co. v. Oklahoma Tax Commn., 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404, 412 (1987).

The legislative history of § 554(c) is limited, however, it contains no legislative intentions contrary to the statute. See H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 92 (1978). The House and Senate Reports on this provision of the Code are nearly identical and describe how the section is to operate. The most relevant passage is, "In order to aid administration of the case, subsection [c] deems the court to have authorized abandonment of any property that is scheduled under section 521(l) and that is not administered **before** the case is closed." (emphasis added) S. Rep. 95-989.

The reports essentially paraphrase the plain language of § 554(c). The word "before" was carefully chosen by Congress. The ruling of the Tenth Circuit disregards the word "before," and rewords the statute to read, "Unless the court [subsequently] orders otherwise, any property scheduled under section 521(l) that is not administered before the case is closed is deemed abandoned to the debtor." Such a construction of the statute is clearly contrary to the concept of finality as well as legislative intent.

The intent of Congress is made even clearer by looking at § 554(d). It provides, "Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate." When read in conjunction with all of § 554, this paragraph is intended to preserve any property that has somehow gone un-noticed by the trustee and the court when the case is

closed. Such a catch-all paragraph further supports the clear legislative intent of § 554(c) to abandon scheduled property upon closing of the case.

### C. This Honorable Supreme Court has Adopted the Plain Meaning Doctrine in Relevant Similar Cases.

The statutory construction at issue in this case in remarkably similar to that in the case of Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). In that chapter 7 case, a debtor had claimed potential proceeds from a pending lawsuit as exempt on her initial schedule of assets. The relevant section was 522(l) which essentially provided, "Unless a party in interest objects, what is claimed as exempt is exempt." No objection to the claim was lodged within the statutory time frame. Although no objection was made, the trustee later moved to acquire the proceeds from the lawsuit on the grounds that the debtor had no statutory basis to claim such an exemption. The Bankruptcy Court agreed with the trustee, and the District Court affirmed.

Reversing, the Third Circuit Court of Appeals held that the Bankruptcy Court could not force the debtor to turn over the money because the debtor had claimed it as exempt, and the trustee had failed to object to the claimed exemption in a timely manner. Taylor at 641-642. The Supreme Court granted certiorari and affirmed the Third Circuit.

All parties in the case agreed that the debtor did not have a right to exempt the proceeds from the lawsuit, and that the trustee could have made a valid objection. Taylor at 642. However, the court held that the trustee's failure to object in a timely manner prevented him from challenging the operation of section 522(l). Taylor at 643.

The logic with which Justice Thomas explained the operation of the Code provision is particularly insightful:

> Rule 4003(b) gives the trustee and creditors 30 days from the initial creditors' meeting to object. By negative implication the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.' The Bankruptcy Court did not extend the 30-day period. Section 522(l) therefore has made the property exempt.

Taylor at 643. This Court confirmed its strict adherence to the plain meaning doctrine with the statement, "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." Taylor at 644.

The Taylor case is particularly applicable because of the similarity of the statutes in question. Again, § 522(l) provides that unless there is an objection, any property claimed as exempt is exempt. Similarly, § 554(c) provides that unless the court orders otherwise, any scheduled property not otherwise administered is abandoned. In applying the logic of the Taylor Court to the instant proceedings, because there was no order to the contrary, the operation of § 554(c) should be absolute. The Bankruptcy Court did not order otherwise. Section 554(c) therefore has made the property "abandoned."

Furthermore, the Taylor Court reasoned that because a 30-day time limit was provided for objections, by negative implication, no objections can be made after the 30-day period. Similarly, because § 554(c) provides the court may order otherwise before closing, by negative implication, the court may not order otherwise after the closing. Such interpretation is supported by the legislative history, as argued, supra. The

operation of 554(c) is absolute. Such a deadline may lead to unwelcome results, but it produces finality and promotes the policy of finality of judgments.

The problem that has now been created with the ruling of the Tenth Circuit is that for over two years, from June 4, 1993 until August 30, 1995, the oil and gas properties belonged to the Woods. Royalty revenues were generated from those oil and gas properties during that time period, over which ownership is now very uncertain. Must the Woods now give back what they had received in interim oil and gas revenues? Clearly, the potential applications of this question are limitless.

In any similar case where an asset is capable of producing income, or where a debtor may dispose of property "technically" abandoned during the time a case is closed, but before being re-opened, ownership to that property in the interim period will be revoked as well, potentially creating a wealth of title disputes. Quite simply, a rule of law allowing revocation of an abandonment, here, two years and two months later, is demonstrably at odds with the clear intention of Congressional mandate, and the overall purpose of the Bankruptcy Code.

## II.

## EQUITABLE PROVISIONS OF THE BANKRUPTCY CODE SHOULD NOT BE CONSTRUED TO CIRCUMVENT THE PLAIN LANGUAGE OF 11 U.S.C. §554(c)

The Bankruptcy Court found that § 105(a) of the Bankruptcy Code should be applied to equitably circumvent the operation of the plain language in § 554(c). The Tenth Circuit seized upon Rule 60 of the F.R.C.P. as applied by Rule 9024 of the F.R.B.P. to do the same. It is a well settled principle

whatever equitable powers remain with the bankruptcy courts must be exercised within the confines of the Bankruptcy Code. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S.Ct. 963, 968-969, 99 L.Ed.2d 169, 179 (1988).

Section 105(a) of the Bankruptcy Code provides in part:

> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The plain language of section 105(a) contains an express limitation on the applicability of that section. Any order, process, or judgment may only be issued "to carry out the provisions of this title." Exercising equity in direct contravention of specific legislative directives cannot be carrying out the provisions of Title 11. Bankruptcy case law from all jurisdictions is in accord.

Since Norwest Bank Worthington v. Ahlers, the Tenth Circuit Court of Appeals had addressed the same issue three times, and strictly adhered to the rule. In In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990), the District Court for the Western District of Oklahoma affirmed an order by the Bankruptcy Court permanently enjoining an attorney's attempt to recover fees under a pre-bankruptcy contract.

Citing Ahlers, the Tenth Circuit reversed the District Court and recognized that the availability of injunctive relief under 105(a) could not be exercised in a manner inconsistent with other, more specific provisions of the Code. Western Real Estate Fund at 601. Consequently, the stay could not be extended into a permanent injunction because doing so would improperly insulate the nondebtors in violation of section 524(e) of the

that Bankruptcy Code. Id. at 602.

In In re Preferred Door Company, Inc., 990 F.2d 547 (10th Cir. 1993), the Debtor argued that post-petition employment tax interest and penalties should be reclassified as general unsecured claims. The Bankruptcy Court refused to do so, the District Court affirmed, and the Debtor appealed.

The Tenth Circuit also affirmed, noting that sections 503(b)(1)(B) and (C) of the Bankruptcy Code specifically define taxes incurred by the estate as administrative expenses. Preferred Door at 549. The court stated, "Preferred Door lacks support for its assertion the bankruptcy court has the authority to reclassify claims." Citing Ahlers, the court noted that although bankruptcy courts possess broad equitable powers, "these powers must and can only be exercised within the confines of the Bankruptcy Code." Id. Because the Bankruptcy Code specifically prioritizes claims, the bankruptcy courts are without equitable powers to place them in any other position. Id.

Finally, the case of In re Meridith Hoffman Partners, 12 F.3d 1549 (10th Cir. 1993), addressed the Bankruptcy Court's equitable powers on issues of transfer avoidance. The debtor made a transfer to a mortgagee, the trustee sought avoidance, the Bankruptcy Court granted relief, and the District Court affirmed.

On appeal to the Tenth Circuit, debtor argued that taking the money from the transferee was "grossly unfair" merely because it benefited an inside guarantor. Meridith Hoffman at 1557. Affirming the District Court, and citing Ahlers, the Tenth Circuit stated that the courts' equitable powers do not permit them to disregard the clear language of the statute, regardless of how unfair it may seem to be. Id. Because the transfer was

specifically avoidable under section 547(b), equitable powers could not prevail.

See also, Matter of Oxford Management, Inc., 4 F.3d 1329 (5th Cir. 1993) (Powers granted by 105(a) must be exercised in manner that is consistent with Bankruptcy Code); In re WAPI, 171 B.R. 130 (N.D.Ala. 1994) (105(a) is not a roving commission for court to do equity); In re Minor, 115 B.R. 690 (D.Colo. 1990) (105(a) does not authorize court to enter orders which are in conflict with other provisions of bankruptcy code); Matter of PHM Credit Corp., 110 B.R. 284 (E.D.Mich. 1990) (105(a) does not give bankruptcy courts authority to contravene specific provisions of Code); In re Rohnert Park Auto Parts, Inc., 9th Cir.BAP (Cal.) 1990, 113 B.R. 610 (Although 105(a) endows court with general equitable powers, that section does not authorize relief inconsistent with more specific laws); Matter of Dues, 98 B.R. 434 (N.D.Ind. 1989) (General equitable powers of bankruptcy court may only be used as basis for court's action where other applicable law does not address situation); In re Security and Energy Systems, Inc., 62 B.R. 676 (W.D.N.Y. 1986) (Bankruptcy court's broad equitable powers do not allow it to override explicit mandates of other sections of the Bankruptcy Code).

**Rule 60 is Inherently Equitable in Nature**

Federal Rule of Civil Procedure 60(b)(1) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> . . .

This Rule is inherently equitable in nature, and as such, it is subject to the same constraints placed upon the other equitable provisions of the Bankruptcy Code. State Bank of S. Utah v. Gledhill, 76 F.3d 1070, 1080 (10th Cir. 1996).The general equitable powers of the bankruptcy courts cannot be exercised to circumvent the specific legislative directive in 11 U.S.C. § 554(c). Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988).

The Tenth Circuit's departure from its previous decisions remains unexplained. Here the Court recognized the equitable nature of its decision, but nevertheless utilized general equitable powers to affirm actions violative of a specific code provision.

## CONCLUSION

Congress has provided a simple means for determining the status of unadministered, scheduled assets upon closing of all bankruptcy cases. Section 554(c) of the Bankruptcy Code is a clear and unambiguous expression of that legislative intent.

Because the legal effect of §554(c) is clear, the Bankruptcy Court searched for legal grounds to vacate the order closing the case, not merely re-open it. Such an order nullifies the operation of §554(c) because, in fictional effect, the case was never closed. The Tenth Circuit sanctioned this fiction. This equitable circumvention of clear legislative directives is an unwarranted and overreaching use of the Bankruptcy Court's equitable powers. Furthermore, it violates this Court's strict adherence to the Plain Meaning Doctrine.

ACCORDINGLY, we submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**July 9, 1999**

**APPENDIX A**

PUBLISH

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

| | |
|---|---|
| In re: MAURICE G. WOODS and TERESA J. WOODS<br>Debtors | |
| | No. 98-6063 |
| MAURICE G. WOODS and TERESA J. WOODS<br>Appellants,<br>v.<br>THOMAS J. KENAN, Trustee; ANDREWS ROYALTY, INC.; GARY J. LAMB; and JON M. MORGAN,<br>Appellees. | |

**APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL**
**(BAP NO. WO-97-035**

Maurice G. Woods, II, McAtee & Molinsky, P.C., Oklahoma City, Oklahoma, for Appellants.

Thomas J. Kenan (David Pomeroy with him on the brief), Fuller, Tubb, Pomeroy, Kirschner, Bickford & Stokes, Oklahoma City, Oklahoma, for Appellee, Kenan.

Before **ANDERSON**, **BRORBY**, and **MURPHY**, Circuit Judges

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**ANDERSON**, Circuit Judge.

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This is an appeal from a decision of the Bankruptcy Appellate Panel (BAP). The appellants, Maurice G. and Teresa J. Woods (the Woods), argue that at the closing of their Chapter 11 bankruptcy case in 1993, certain properties of the bankruptcy estate were irrevocably abandoned to them by operation of law. Thomas J. Kenan, who served as Chapter 11 trustee and as trustee under the confirmed plan of reorganization, argues that the case was properly reopened, that any abandonment was subsequently revoked, and that the properties in question were validly sold to third parties. Because we agree that the bankruptcy court had authority under 11 U.S.C.§ 350(b) to reopen the case, and that under Fed. R. Civ. P. 60(b) it effectively vacated the original order closing the case, we hold that the abandonment was revoked and that the debtors have no interest in the properties.

## 1. BACKGROUND

The Woods filed a Chapter 11 bankruptcy petition in December 1984. In May 1987, Thomas Kenan was named trustee of the bankruptcy estate, which at that time included a number of fractional interests in oil and gas properties. The central issue in this case is the ownership of those interests, which have been described as "very small interests in a large number of properties," essentially constituting a "revenue stream." Appellants' App. Vol. I at 68 (testimony of Kenan in bankruptcy court, April 24, 1997).

The trustee asserts that his sale of the properties to Andrews Royalty, Inc., Gary J. Lamb, and Jon M Morgan, doing

business as Packard Partners (Packard), is valid. The Woods, however, claim that all the properties were irrevocably abandoned to them by operation of law when an order closing the bankruptcy case was entered before sale of the properties was consummated. In the alternative, they argue that certain properties were not included in any valid sale, alleging that in written agreements and conveyances the trustee repeatedly failed to describe in full detail the numerous properties constituting the "revenue stream". They also insist that some of the oil and gas interests were specifically abandoned to them by the trustee in a 1987 motion. In order to address these claims, we find it necessary to lay out the lengthy history of this case in some detail.

**A.**

In 1987, soon after Kenan's appointment as trustee, Maurice Woods advised Kenan of certain causes of action he believed he had against third parties, for oil and gas properties which were previously owned by his father and which he claimed should have been conveyed to him. After examining the merits of these claimed causes of action, the trustee determined that pursuing them would be burdensome to the estate, and on August 3, 1987, filed a motion to abandon them to the debtors. The United States Bankruptcy Court for the Western District of Oklahoma approved this motion on August 19, 1987.

On July 10, 1991, the trustee's proposed plan of reorganization was confirmed; it appointed Kenan to administer the plan, pursuing the business of the estate until such efforts were no longer justified, at which time he was to sell the estate's interest in the oil and gas properties. By April 1993 the trustee had determined that it was no longer prudent to continue the business of the estate, and therefore arranged for the sale of the

oil and gas properties.

On April 21, 1993, the trustee filed a motion asking the bankruptcy court to approve a proposed sale. This motion was set for hearing on May 14, 1993. On May 6, 1993, the case came up for hearing on the bankruptcy court's routine disposition docket. At this hearing the trustee noted the filing of his Motion to Approve Sale and reported that the sale of the properties and distribution of the proceeds would complete the administration of the estate. The bankruptcy court requested that the trustee file his final report and application for final decree at the trustee's earliest convenience.

At some point, the trustee was approached by additional parties interested in buying the oil and gas properties, and he successfully requested that the hearing on the Motion to Approve Sale be continued until July 9, 1993, so that he could obtain the highest possible value for the properties; the motion was eventually heard on August 18, 1993. Nevertheless, on May 13, 1993, the trustee filed his final report and made application for a final decree. On June 3, 1993, the bankruptcy court entered a final decree stating that "[t]he estate of [the Woods] has been fully administered, the trustee, Thomas J. Kenan is discharged as trustee of the estate..., and the case is closed." Appellants' App. Vol. I at 186.

On July 15, 1993, Kenan filed a document titled "Trustee's Further Description of Oil and Gas Properties," referring to his previously filed Motion to Approve Sale, and describing more fully some of the oil and gas properties of the estate. When on August 18, 1993, the bankruptcy court held a hearing on Kenan's Motion to Approve Sale filed April 21, 1993, the Woods were present and represented by Counsel. The Woods objected to the sale of the properties, but not on the ground that the bankruptcy case was already closed. The

bankruptcy court entered an order granting Kenan's motion and approving the sale of the properties described in the April 21, 1993, and July 15, 1993, filings. Kenan thereafter prepared and delivered instruments of conveyance to the purchasers, Packard, for the price of $72,000. At some point, Kenan's $5,000 trustee's bond was exonerated.

At some time following the order approving the sale to Packard, the Woods began sending letters to the entities that were purchasing production from the oil and gas properties, alleging the following defects in the transfer of the properties: (1) some properties had not been specifically described in Kenan's filings; (2) some instruments of conveyance, although recorded in the appropriate counties, had undated notarizations and were therefore void; (3 some or all of the properties had reverted to the Woods by operation of law. Following these allegations, some purchasers of production began suspending payments to Packard. In July 1995, Packard notified Kenan that Maurice Woods had written to at least two purchasers of production contending that all transfers from Kenan to Packard were void because the final decree closing the case was entered before the bankruptcy court's August 18, 1993, order approving the transfers.

**B.**

Because of the Woods' challenges to the validity of the transfers, on July 27, 1995, Kenan filed a motion in the bankruptcy court to reopen the Woods' case. On August 22, 1995, the court held a hearing on the motion, and on August 30, 1995, issued an order reopening the case and vacating its prior order closing the case. In its findings of fact, the court found that any premature closing of the case "was due to inadvertence or excusable neglect," and stated that "[c]losing of the case occurred [during a time period in which] there was an administrative effort by the Assistant United States Trustee's

office, the Clerk, and others to close old cases." Appellee's App. At 5-6. It further determined that the Packard Partners were "bona fide purchasers" of the contested properties, that "[t]he actions of the debtors in attempting to upset the rights of the bona fide purchasers constitute[d] misconduct," and that "[I]t would be unjust and inequitable if, somehow, the debtors were to retain these valuable oil and gas properties at the expense of the good faith purchasers." Id. At 6. It also found that "[a]ny errors in the descriptions of the oil and gas properties and any errors in the acknowledgments of the conveyances to the Packard Partners, [were] harmless errors." Id.

In its conclusions of law, the bankruptcy court rejected the Woods' argument concerning 11 U.S.C.§ 554(c). That statute reads as follows:

Unless the court orders otherwise, any property scheduled under Section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title. Reading the opening clause of § 554(c) in conjunction with 11 U.S.C. § 350(b), which provides that a bankruptcy case may be reopened for cause, the court determined that it had authority to reopen the case, and to "order[] otherwise," i.e., to vacate its final decree closing the case in order to settle Packard's ownership of the contested properties. It also relied on Fed. R. Civ. P. 60(b), based on "the misconduct of the debtors," "the mistake, inadvertence, or excusable neglect of the trustee," "the principles of equity," and "the windfall to the debtors that would occur."[1] Appellee's App. At 9-10.

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[1]As an alternative rationale, the court cited its 11 U.S.C. § 105(a) power to "issue any order, process, or judgment that

[1](continued ...)

On appeal, the district court affirmed by order dated May 1, 1996. It reasoned that one purpose for § 554(c)'s language allowing a court to "order[] otherwise" was "to provide for the circumstance where the court finds that there is a valuable asset that should have been administered by the trustee." Appellee's App. At 18. It also held that "[b]ecause the bankruptcy court's finding that the case was prematurely closed due to mistake, inadvertence or excusable neglect is not clearly erroneous, the bankruptcy court did not err or abuse its discretion in vacating the final decree and order closing the bankruptcy case." Id. At 19. We dismissed the Woods' subsequent appeal to this court as a jurisdictionally defective appeal from the affirmance of an interlocutory order. Woods v. Kenan (In re Woods), No. 96-6181, slip. Op. (10 Cir. Feb. 7, 1997).

On March 6, 1997, with the case thus reopened and the prior closing order vacated, Kenan filed a motion in the bankruptcy court to approve the sale of oil and gas properties to Packard. These properties included interests "that he had failed to specifically describe in the earlier motion to approve the sale of oil and gas properties to the Packard Partners." Trustee's Motion of March 6, 1997, Appellants' App. Vol. II at 284. The Woods filed objections to the motion, as well as their own motion demanding an accounting of revenues from the contested properties, and a motion asking the court to require Kenan to post bond in the amount of $200,000.

On April 24, 1997, the bankruptcy court heard evidence

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[1](...continued)

is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The district court did not rely on this ground to affirm the bankruptcy court, and we do not discuss it here.

on the motions. The Woods argued that the contested properties had been irrevocably abandoned to them at the time the case was closed. They also argued that the court's August 19, 1987, order of its own force abandoned certain specific properties and not merely causes of action. They presented no evidence that they had obtained any of the contested properties pursuant to the abandoned causes of action. On May 21, 1997, the court issued an order granting Kenan's motion to approve the sale of oil and gas properties to Packard. In its findings of fact, it stated that its order of August 19, 1987, abandoned only causes of action, not oil and gas properties. In its conclusions of law, it held that the confirmed plan of reorganization "is re judicata and controls the rights of the parties thereunder." Appellee's App. At 28. It held that "[t]he trustee has authority under the confirmed plan of reorganization to sell these properties to the Packard Partners. The earlier, inadvertent closing of the case is immaterial, because the case has been reopened." Id. Relying on the provisions of the confirmed plan, the court also held that Kenan was not required to post a bond or to provide an accounting. After the court had announced its ruling approving the trustee's sale to Packard, the Woods asked to bid on the properties. The court responded, "Well, they've been sold....And if the Woods want to buy them, I guess, they can go to Packard." Appellants' App. Vol. I at 115.

Undeterred, the Woods appealed to the BAP. Applying the law of the case doctrine, the BAP refused to reach issues related to the bankruptcy court's August 30, 1995, ruling reopening the case and vacating the final decree, stating that those issues would "need to be addressed on appeal to the Tenth Circuit." Woods v. Kenan (In re Woods), 215 B.R. 623, 626 (B.A.P. 10th Cir. 1998). However, it held that (1) disallowing the Woods' bid on April 24, 1997, did not violate due process; (2) Kenan's March 6, 1997, Motion to Approve Sale was not void for lack of bond, under the confirmed plan; and (3) the

bankruptcy court properly concluded that its August 19, 1987, order did not affect the sale to Packard, because the order abandoned only causes of action, and because the Woods "failed to produce any evidence" that they received properties pursuant to those causes of action. Id. at 627.

Before this court, the Woods again argue that apart from any considerations of "'fairness' and 'equity,'" Appellants' Br. At 8, they are entitled by operation of law to the contested oil and gas properties.

## II. DISCUSSION

The BAP was correct in observing that despite its own deference, under the law of the case doctrine, to the district court's order of May 1, 1996, we are not bound by that ruling. "So long as a matter is properly preserved in [a] lower court, the fact that the lower court can properly refuse reconsideration as a matter of law of the case of course does not prevent subsequent review. . .on appeal." 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478, at 801 (1981); cf. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("[A] district court's adherence to law of the case cannot insulate an issue from appellate review."). The Woods properly preserved their challenges to the district court's order by raising them before the BAP. Therefore, in addition to the issues ruled on by the BAP, we also reach issues which the district court decided but which the BAP declined to address, relating to the bankruptcy court's order of August 30, 1995.

### A. Technical Abandonment under § 554(c)

#### 1.

When the Woods' case was closed on June 3, 1993, the contested properties were abandoned to the Woods by operation of law

and were deemed fully administered. The trustee does not appear to argue to the contrary. Under § 554(c), a technical abandonment is necessarily the effect of the closing order, regardless of the trustee's intentions. At the time of closing, the court had not "order[ed] otherwise;" the property was scheduled; and the property, although in the process of administration, had not been "otherwise administered." See, e.g., In re Shelton, 201 B.R. 147, 155 (Bankr. E.D. Va. 1996) ("[T]here appears little doubt that [the trustee] technically abandoned the [contested p]roperty under § 554(c) when he failed to administer that asset prior to the closure of [the] case."); Stanley v. Sherwin-Williams Co., 156 B.R. 25, 27 (W.D. Va. 1993) ('It would be neither desirable nor consistent with § 554 to resolve abandonment questions by returning to the uncertain practice of attempting to determine the trustee's intentions."). Contra In re Schmid, 54 B.R. 78, 79-80 (Bankr. D. Or. 1985) ("The trustee did not intend to abandon the lawsuit under . . . § 554(c). Consequently, there was no abandonment. . . . Inadvertence should not accomplish an abandonment under circumstances where abandonment would not have been allowed had it been requested before closing."); Mele v. First Colony Life Ins. Co., 127 B.R. 82, 86 (D.D.C. 1991) ("[I]t must also be shown that the abandonment of a claim is the 'result of an intelligent decision' by the trustee." (quoting Schmid, 54 B.R. at 80)).

2.

The crucial issue in this case is whether and under what circumstances the technical abandonment was revocable. Courts have taken varying approaches to this issue. Some courts have held, as did the bankruptcy and district courts in this case, that § 554(c) by its terms allows a court broad power to modify or revoke a technical abandonment once a case is reopened under § 350(b), because a court may simply "order[] otherwise" after the fact. See Neville v. Harris, 192 B.R. 825, 832 (D.N.J. 1996);

Shelton, 201 B.R. at 155 (alternative holding) (citing Neville); DeVore v. Marshack (In re DeVore), 223 B.R. 193, 198 (B.A.P. 9th Cir. 1998) (citing Neville and Shelton). Others have held that the reopening of a case under § 350(b) automatically revives the original case and negates any technical abandonments. See Compass Bank for Savings v. Billingham (In re Graves), 212 B.R. 692, 695-96 (B.A.P. 1st Cir. 1997); Shelton, 201 B.R. at 155-56 (alternative holding); Figlio v. American Mgmt. Servs., Inc. (In re Figlio), 193 B.R. 420, 424-25 (Bankr. D.N.J. 1996) (indulging the fiction that a reopened case "was never 'closed'"). Still others have held that technical abandonments of scheduled property known to the trustee are irrevocable. See, e.g., Huntington Nat'l Bank v. Hunter (In re Hunter), 76 B.R. 117, 118-20 (Bankr. S.D. Ohio 1987); In re Atkinson, 62 B.R. 678, 679-80 (Bankr. D. Nev. 1986).

We disagree with each of these approaches. The first approach is unsound because as we read it, § 554(c) does not speak to the issue of whether an abandonment is revocable. In fact, it says nothing about what happens after a technical abandonment. It states only that a court may prevent a technical abandonment by "order[ing] otherwise." Cf. In re Prospero, 107 B.R. 732, 734 (Bankr. C.D. Cal. 1989) ("order[ing] otherwise" at the closing of case); In re Hart, 76 B.R. 774, 778 (Bankr. C.D. Cal. 1987) (same). That is, under certain conditions, a technical abandonment will occur at the closing of a case "[u]nless the court orders otherwise;"

We disagree with the second approach because we do not think reopening a case should always automatically[2] have such a potentially unexpected and unwanted legal consequence.

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[2]Some cases purporting to adopt this approach do so by reading into a court's reopening order an intent to accomplish a revocation. See, e.g., Shelton, 201 B.R. at 156 ("[T]he very

We see no reason, for example, why a debtor seeking to reopen a case in order to schedule an overlooked debt should have to relinquish all technically abandoned properties (which may have in the meantime increased in value through the debtor's efforts); or why, after an intentional technical abandonment, reopening should always bring burdensome properties back into the estate. See DeVore, 223 B.R. at 198 ("We fail to see how the reopening of a bankruptcy case and withdrawal of a no asset report, without more, negate a valid technical abandonment. The reopening of a case is 'merely a ministerial or mechanical act [that] . . . has no independent legal significance and determines nothing with respect to the merits of the case.'" (quoting In re Germaine, 152 B.R. 619, 624 (B.A.P. 9th Cir. 1993)); cf. Fed. R. Bankr. P. 5010 advisory committee's note (1991) ("In most reopened cases, a trustee is not needed because there are no assets to be administered."). Moreover, § 350(b) does not indicate what effect reopening has on technical abandonments, and it does not by its terms provide authority to revoke an abandonment.[3]

We disagree with the third approach because it is simply

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[2]( ...continued)

act of reopening the closed case under these circumstances implicitly acknowledges the Court's reasoned determination that the otherwise abandoned property should be returned from the debtor to the debtor's estate for potential administration by the trustee."); In re Graves, 212 B.R. at 695 ("We find it important that the bankruptcy judge did not limit the purpose for which the reopening was taking place when he reopened the case."). In this respect, these cases are similar to those that rely on a court's power to "order[] otherwise" under § 554(c).

[3]Although under § 350, "[a] case may be reopened in the court

[3](continued ...)

an overbroad application of the general rule that "[o]nce properly accomplished, an abandonment is irrevocable."[4] 3 William L. Norton Jr., Norton Bankruptcy Law and Practice § 53:2 (2d ed. 1995 & supp. 1998). Unlike an abandonment under § 554(a)-(b), which by very definition must be intentional and unequivocal and to which the general rule of irrevocability applies rather strictly, see, e.g., In re Gibson, 218 B.R. 900, 904 (Bankr. E.D. Ark. 1997), a technical abandonment may occur inadvertently as an automatic consequence of premature case closing. Thus, abandonment under § 554(c) "is merely a rebuttable resumption. If a party in interest objects and the considerations that would have justified abandonment prior to the closing of the case do not exist, the court has discretion to reopen the case and order further administration." 3 Norton, supra, at § 53:3.

Thus, we conclude that a strict irrevocability rule does

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[3]( ...continued)
in which such case was closed to administer assets," technically abandoned assets are by the terms of § 554(c) already deemed "administered." Reopening "to administer assets" is possible only when there are assets unknown to the trustee at the time the case was closed. See 3 Lawrence P. King et al., Collier on Bankruptcy ¶ 350.03[1] (15th ed. Rev. 1998).

[4]Cases purporting to apply a broad rule of irrevocability to technical abandonments typically involve one or more factors cutting against revocation, such as reliance interests, see In re Atkinson, 62 B.R. at 679-80 (noting that debtors had pursued an abandoned cause of action at significant expense), or a conscious decision by the trustee to accomplish the abandonment, see In re Hunter, 76 B.R. at 120.

not properly account for Fed. R. Bankr. P. 9024, which provides that Fed. R. Civ. P. 60 applies, with minor modifications,[5] to all bankruptcy cases.[6] Under Fed. R. Civ. P. 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . ." While we agree with the many courts that have held that a bankruptcy court may, in appropriate circumstances, revoke a technical abandonment, we do so on the basis of Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b). See, e.g., In re Schmid, 54 B.R. 78, 81 (alternative holding); see also In re Sutton, 10 B.R. 737, 740-41 (Bankr. E.D. Va. 1981) (discussing Rule 60(b) but declining to revoke an abandonment); cf. In re Ozer, 208 B.R. 630, 633-34 (Bankr. E.D.N.Y. 1997) (noting that courts have allowed revocation of technical abandonments "in certain instances, if the abandonment takes place due to particularly relevant clerical mistake or inadvertence of the trustee"); In re Lintz West Side Lumber, Inc., 655 F.2d 786, 789-91 & nn. 4-6 (7th Cir. 1981) (decided under the Bankruptcy Act of 1898) (relying in part on Rule 60(b) for revocation of an abandonment order, "where there has been a mistake in the original abandonment and where the purported [owner] has not been unfairly prejudiced.").

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[5]One such modification is that "a motion to reopen a case . . . is not subject to the one year limitation prescribed in Rule 60(b)." Fed. R. Bankr. P. 9024.

[6]The Woods argue that Rule 60(b) is inapplicable to this case because "the general equitable powers of the bankruptcy courts cannot be exercised to circumvent the specific legislative directive in 11 U.S.C. § 554(c)." Appellants' Br. At 37. We reject this argument, for as we have pointed out, § 554(c) says nothing about the revocability of technical abandonments.

3.

Here the bankruptcy court first reopened the case under § 350(b) and then relied on Rule 60(b) to vacate its prior closing order. We review a court's decision to reopen a case under § 350(b) only for an abuse of discretion. See Nintendo Co. v. Patten (In re Alpex Computer Corp.), 71 F.3d 353, 356 (10th Cir. 1995); In re Bianucci, 4 F.3d 526, 528 (7th Cir. 1993). Section 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." We have no trouble concluding that if Rule 60(b) relief was available and warranted, the court was justified in reopening the Woods' case for "cause." See In re Shondel, 950 F.2d 1301, 1305 (7th Cir. 1991) ("[A] bankruptcy court exercises equitable powers and . . . should emphasize substance and not technical considerations that will prevent substantial justice. . . .[C]ounsel neglect or mistake . . .may be a factor in the finding of 'other cause'" under § 350(b) (citations and internal quotes omitted)). The issue of the propriety of Rule 60(b) relief, however, requires a more searching analysis.

> Rule 60(b) provides in relevant part:
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence. . ..; (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Although the bankruptcy court did not specify by number which subsections of Rule 60(b) grounded its decision, it apparently relied on subsections (1) (based on "mistake, inadvertence, or excusable neglect,"), (3) (based on "the misconduct of the debtors,"), and (6) (based on "the principles of equity," and "the windfall to the debtors that would occur"). Appellee's App. At 9-10. Even assuming the Woods are correct regarding the inappropriateness of Rule 60(b)(3) relief in this case, see Appellants' Br. At 18-20, we think the bankruptcy court was fully justified in relying on either Rule 60(b)(1) or Rule 60(b)(6).

Because "the trial court is vested with a great deal of discretion in determining whether to grant or deny a Rule 60(b)(1) motion," we will not overturn that determination "absent abuse." Otoe County Nat'l Bank v. W & P Trucking, Inc., 754 F.2d 881, 883 (10th Cir. 1985). We note the bankruptcy court's finding that premature closing of the case "was due to inadvertence or excusable neglect," Appellee's App. At 6, a finding that was upheld by the district court and that we have no reason to question.[7]

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[7]The Woods argue that "[t]here was clearly no inadvertence or neglect in the Trustee's actions to close this case," and that it is "obvious" that the "Trustee was fully aware of the consequences of his actions in filing an application to close this Chapter 11 Case." Appellants' Br. At 33, 36. The record indicates that neither the trustee nor the Woods nor even the court were so enlightened. Given the fact that the trustee attempted a post-closing sale to Packard, which the bankruptcy court approved (with the Woods present and silent as to the effect of the case closing, see Appellee's App. At 3), their present arguments on the issue of inadvertence do not appear to be made in good faith and are not well taken.

While it is true that Rule 60(b)(1) relief is generally not available for the mere carelessness of a party, see Pelican Prod. Corp. v. Marino, 893 F.2d 1143, 1146 (10th Cir. 1990), something more than that was involved here. In the spring of 1993, Kenan was actively discharging the trust, seeking to obtain the highest price for the contested properties, and he so notified the court in his first Motion to Approve Sale.[8] The court, while this motion to approve a sale of estate properties was still pending, nevertheless told Kenan to enter a request for a final decree, and then itself entered that decree prior to hearing the pending motion. In hindsight, Kenan likely wishes he had waited until after the sale to enter his request for a final decree; perhaps at the time he expected the court to wait to act on the request until after it had heard his motion. In any event, Kenan made his unfortunate filing at the court's behest, in a period in which, as the bankruptcy court found, the clerk was pushing to close cases such as this one.[9] In these circumstances, any neglect by the trustee was excusable. Furthermore, we note

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[8]Thus this was not a case where inadvertence resulted from lack of diligence. See 12 James Wm. Moore et al., Moore;s Federal Practice ¶ 60.41[1][c][ii] (3d ed. 1998).

[9]Apparently the court, the trustee, and the debtors initially treated the case closing as of little consequence; and the bankruptcy court reasoned, in its order reopening the case, that "[c]losing a case is basically a matter of administration allowing the clerk to close the files and ship them off to the archives." Appellee's App. At 9.

that the bankruptcy court has power under Rule 60(b)(1) to correct its own inadvertent errors. See 12 James Wm. Moore et al., Moore's Federal Practice ¶ 60.41[3] (3d ed. 1998); see also Fed R. Civ. P. 60(b) advisory committee's note (1946). We think the bankruptcy court's exercise of Rule 60(b)(1) power was most appropriate.

We also uphold the bankruptcy court's reliance on Rule 60(b)(6), a "grand reservoir of equitable power to do justice in a particular case." Pierce v. Cook & Co., 518 F.2d 720, 722 (10th Cir. 1975) (en banc).

One circuit court has noted that there is some confusion at the bankruptcy court regarding the closing of cases. We are told that the clerk has been delegated the authority to close cases, but that the clerk only does so when it is deemed that a reasonable time has passed without case activity. . .. It is also suggested that the closing of a case is ministerial at time. . . . On the other hand, in this matter it is quite clear that the bankruptcy judges did not consider the case to be closed at all, and the parties did not consistently behave as if it were. Schwaber v. Reed (In re Reed), 940 F.2d 1317, 1321-22 n.4 (9th Cir. 1991).

Rule 60(b)(6) "is appropriate. . . when it offends justice to deny such relief," Cashner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996), and will be reversed "only if we find a complete absence of a reasonable basis and are certain that the . . . decision is wrong," State Bank of S. Utah v. Gledhill (In re Gledhill, 76 F.3d 1070, 1080 (10th Cir. 1996). Here it would have been unjust to allow the June 3, 1993, final decree and the resulting technical abandonment to stand, because it would have allowed the Woods to benefit from their own delay at the trustee's expense. The Woods did not raise a claim of technical abandonment at the August 18, 1993, hearing or for a

considerable time thereafter. In the meantime, Kenan transferred the contested properties to Packard and distributed the proceeds to the Woods' creditors. To award the properties to the Woods at this late date would most certainly be contrary to "the principles of equity." Appellee's App. At 10.

The authority to revoke an abandonment under Rule 60(b) is circumscribed, of course, by the standard governing Rule 60(b) relief. Specifically, because Rule 60(b) is inherently equitable, see In re Gledhill, 76 F.3d at 1078, the granting of Rule 60(b) relief may be challenged on equitable grounds. For example, revocation may not be warranted where it would unfairly prejudice the purported owner of the property.

The Woods raise claims of laches and estoppel. They emphasize the fact that at some point the trustee apparently believed and made statements to the effect that a technical abandonment had occurred. They claim that they detrimentally relied on the trustee's actions, that they were "prejudiced" by the receipt of oil and gas revenues from producers to whom they had written, and "were prejudiced in believing that the Trustee would not be challenging the Woods' assertions." Appellants' Br. At 26.

We conclude that the Woods have no equitable claim to these properties. Under the confirmed plan, the properties were supposed to be sold to pay creditors; the estate was far from having a surplus to return to the Woods. Furthermore, as we have emphasized, the Woods themselves failed to raise the issue of abandonment for many months after the case was closed, and when they did raise the issue, it was not with the court or the trustee or even the purchasers. Rather, the Woods wrote to the oil and gas producers in dogged attempts to obtain the very revenues which they now claim "prejudiced" them. The Woods have attempted to take every potential advantage of the

inadvertent closing of this case. We discern no equitable principle that would allow the Woods any further benefit from that mistake. For similar reasons, we do not sympathize with the Woods' claims that the bankruptcy court's rulings threaten finality and deny the Woods a "fresh start." Appellants' Br. At 38. If finality has been disrupted, we do not think it is the court that is to blame.

We therefore conclude that the bankruptcy court acted appropriately in reopening the Woods' case under § 350(b), and that under Fed. R. Civ. P. 60(b) the court's order vacating the prior closing order was not an abuse of discretion. The vacatur of the closing order effectively revoked the prior abandonment and enabled the court to approve Kenan's March 7, 1995 motion to sell the properties to Packard, finalizing what was required by the confirmed plan of reorganization.[10]

**B. Bond**

The Woods claim that Kenan's March 7, 1995 motion was void because he did not have a bond in place. They argue that the bankruptcy court erred by not granting their request under 11 U.S.C. § 322(a) to require a $200,000 bond of Mr. Kenan upon reopening of the case. We agree with the BAP and the bankruptcy court that at the time the case was reopened, Kenan was serving not as Chapter 11 trustee, but as post-confirmation trustee under the terms of the confirmed plan,

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[10]Because we uphold the court's approval of Kenan's March 7, 1995, motion, the Woods' argument that they are entitled to properties not described in previous motions or notices must fail. That the March 7, 1995, motion included properties not described in previous documents is irrelevant.

which did not require him to post a bond. See 11 U.S.C. § 1141(a) ("[T]he provisions of a confirmed plan bind the debtor . . . ."). By its very terms, § 322(a) does not govern the appointment of a post-confirmation trustee:

> [A] person selected under section . . . 1104 . . . of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.

11 U.S.C. § 322(a) (emphasis added). Section 1104 governs the appointment of trustees "[a]t any time after the commencement of the case but before confirmation of a plan." 11 U.S.C. § 1104(a). Thus the Woods' argument fails.

**C. Abandonment Order**

The Woods assert that "[i]ncluded within the list of oil and gas properties ordered sold by the Bankruptcy Court on May 20, 1997 were some properties previously ordered abandoned to the Woods on August 19, 1987." Appellants' Br. At 30. Contrary to this assertion, the BAP and the bankruptcy court both determined that the 1987 order abandoned only the causes of action disclosed by Mr. Woods, not the underlying properties. Reviewing only for clear error, see Rowe Int'l, Inc. v. Herd (In re Herd), 840 F.2d 757, 759 (10th Cir. 1988), we uphold this finding. That the 1987 order abandoned only causes of action is evident from the closing paragraphs of Kenan's brief in support of his motion to abandon:

> Accordingly, the trustee believes that these claims should be abandoned to Maurice G. Woods in order

> that he might pursue them as he might deem fit. Some of the claims may be facing the expiration of a period during which they must be brought, and Maurice Woods should be given the opportunity to persuade another attorney to file these claims at this time on a contingency fee basis.
>
> Accordingly, because of the burden to the estate of paying for this uncertain litigation, the trustee believes he is justified in abandoning these claims to the debtor, Maurice G. Woods.

Appellants' App. Vol. I at 164.

We must agree with the Woods that "[c]ertainly, had the Woods been forced to litigate those claims and been given a judicial award of those property interests, the Bankruptcy Court could not have then reacquired them for the estate." Appellants' Br. At 31. Yet at every stage of the present litigation, the Woods have chosen not to explain when or how they acquired the properties. They have produced no evidence of a settlement agreement or anything of the kind.

The bankruptcy court determined that the properties were subject to sale by the trustee because there was no evidence that they were acquired as a result of the abandoned causes of action. The BAP agreed with this conclusion. So do we.

**D. Disallowance of Bid**

The Woods argue that the Bankruptcy Court's May 21, 1997, Order violates due process by disallowing them the opportunity to bid under § 363 during the sale of their oil and gas properties. This is a meritless argument. We agree with the BAP's resolution of this issue:

> Debtors clearly had adequate notice and the opportunity to be heard. They waited until the Bankruptcy Court had ruled on the second motion to sell before voicing a desire to bid on the property.[11] The Bankruptcy Court's refusal to entertain this request at this stage of the proceeding did not deprive the Debtors of due process.

Appellee's App. At 37.

Accordingly, we AFFIRM.

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[11]Counsel for the Woods admitted at the hearing, "I was hoping my objection would be sustained; and, therefore, we wouldn't need to try to purchase [the properties], you would abandon them to us." Appellants' App. Vol. I at 115-16.

**APPENDIX B**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| IN RE: | ) | |
| MAURICE G. WOODS and | ) | No. 84-03759-A |
| TERESA J. WOODS, | ) | Chapter 11 |
| Debtors. | ) | |

CHAPTER 11 FINAL REPORT AND
APPLICATION FOR FINAL DECREE

Comes now the trustee, and pursuant to the provisions of 11 U.S.C., Sec. 1106(a) (7) and as ordered by this Court, submits that the estate herein is fully administered and substantially consummated as follows:

1. The order confirming the plan has become final;

2. Any deposits required by the plan have been distributed;

3. The property proposed by the plan to be transferred has been substantially transferred;

4. The successor of the debtor under the plan has substantially assumed the business or the management of the property dealt with in the plan;

5. Payments under the plan have commenced;

6. All motions, contested matters, and adversary proceedings have been finally resolved;

and,

7. There are no facts necessary to enable the Court to pass on the provisions of the final decree other than as presented in Schedule A attached hereto.

Wherefore, the Trustee prays for the entry of a Final Decree pursuant to B.R. 3022 finding that the Plan is effective and that the estate has been fully administered.

Dated: May 13, 1993.

---

Thomas J. Kenan, Trustee
Fuller, Tubb & Pomeroy
800 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-4292
(405) 235-2575

SCHEDULE A

There are no facts necessary to enable the Court to pass on the provisions that the case has been fully administered.

SCHEDULE B

The following information is required to close the case:

ADMINISTRATIVE FEES AND EXPENSES PAID:

(If none, so state)

| | | |
|---|---|---|
| 1. | Trustee's Commission | $ 0 |
| 2. | Fee for Attorney for Trustee | $ 9,672 |
| 3. | Fee for Attorney for Debtor | $ 3,152 |
| 4. | Other Professionals | $ 115,867 |
| 5. | All Expenses, including trustee's | $ 38,227 |

11 % Dividend paid under Plan

$50,000 (Amount to be paid to unsecured creditors)
$475,867 (Allowed unsecured claims)

x 100

CERTIFICATE OF SERVICE

The undersigned certifies that on the 13 day of May, 1993, a copy of the above was mailed, postage prepaid thereon, to the persons and addresses listed on Exhibit A attached hereto.

_____

Thomas J. Kenan

**APPENDIX C**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| IN RE: | ) | Case No.: 84-03759-A |
| | ) | |
| Maurice G. Woods and | ) | Chapter 11 |
| Teresa J. Woods, | ) | |
| | ) | |
| Debtors(s) | ) | |

FINAL DECREE

On May 6, 1993, the above styled and numbered case came on for hearing at the Chapter 11 Disposition docket and said case was continued to July 9, 1993. On May 13, 1993, the trustee filed a Chapter 11 Final Report and Application for Final Decree.

IT IS THEREFORE ORDERED THAT:

The estate of the above named debtors has been fully administered, the trustee, Thomas J. Kenan is discharged as trustee of the estate of the above-named debtors, and the case is closed.

DATED: Jun - 3 1993

(s)Richard Bohanon
UNITED STATES BANKRUPTCY JUDGE

**APPENDIX D**

PUBLISH

**UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT**

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IN RE MAURICE G. WOODS and TERESA J. WOODS,

Debtors.

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| | | |
|---|---|---|
| MAURICE G. WOODS and TERESA J. WOODS, | ) | Bankr. No. 84-0739A Chapter 11 |
| Appellants, | ) | |
| v. | ) | |
| THOMAS J. KENAN, Trustee ANDREWS ROYALTY, INC.; GARY J. LAMB; and JOHN M. MORGAN | ) | OPINION |
| Appellees. | ) | |

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Appeal from the United States Bankruptcy Court for the Western District of Oklahoma

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Maurice G. Woods, II, of McAtee & Molinsky, P.C., Oklahoma City, Oklahoma, for Appellants.
Thomas J. Kenan (David Pomeroy with him on the brief), of Fuller, Tubb & Pomeroy, Oklahoma City, Oklahoma, for Appellee Thomas J. Kenan.

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Before PUSATERI, BOULDEN, and ROBINSON, Bankruptcy Judges.

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ROBINSON, BANKRUPTCY Judge.

The Debtors, Maurice and Teresa Woods, appeal from the May 21, 1997 Order of the United States Bankruptcy Court for the Western District of Oklahoma. The Order granted the Trustee's Motion to Approve Sale of Oil and Gas Properties; denied the Debtors' Motion to Require a Trustee's Bond; and denied the Debtors' Motion for an Accounting. For the reasons set forth below, we AFFIRM the Order of the Bankruptcy Court.

**1. Background**

The following factual findings included in the Bankruptcy Court's May 21, 1997 Order are not challenged by the Debtors. This case was commenced on December 17, 1984, when the Debtors filed a voluntary petition under Chapter 11. On May 1, 1987, Thomas J. Kenan (Kenan) was appointed as trustee of the Chapter 11 estate. Soon after such appointment, Maurice Woods advised Kenan that he believed he had certain causes of action against the estate of his deceased father or his heirs, as well as Southwest Petroleum, Inc., or Southwest Enterprises, Inc. These causes of action purportedly arose out of dispositions of property to the corporations made by the

decedent on behalf of Maurice Woods.

After examining the merits, Kenan filed a Motion to Abandon to the Debtors such causes of action. On August 19, 1987, the Bankruptcy Court entered an order approving this motion. The order expressly abandoned any causes of action the Debtors may have had against the named persons or corporations; the order did not expressly mention abandonment of any oil and gas properties.

The Debtors' plan of reorganization was confirmed on July 10, 1991. The confirmed plan appointed the Chapter 11 trustee, Kenan, as the trustee to administer the plan of reorganization. The confirmed plan authorized Kenan to perform all acts necessary or appropriate to the consummation of the plan. The plan further provided that any assets recovered post-confirmation by Kenan, or coming into his possession as a result of the administration of this case, would be property of the estate.

The confirmed plan reserved in the Bankruptcy Court the authority to decide all issues regarding title to the assets, and to decide causes of action. It provided that the Bankruptcy Court had jurisdiction to correct any defect, cure any omission and reconcile any inconsistency in the plan or the order that was necessary to carry out the purposes and intent of the plan. Jurisdiction continued for the court to enforce and interpret the terms and conditions of the plan.

Kenan filed a Motion to Approve Sale of Oil and Gas properties on April 21, 1993, Kenan filed his Chapter 11 Final Report and Application for Final Decree on May 13, 1993. On June 4, 1993, after confirmation but before the oil and gas properties had been sold, the Bankruptcy Court entered a Final Decree that sustained Kenan's application for a final decree

and closed the bankruptcy case. By Order dated August 13, 1993, the Bankruptcy Court approved the sale of certain oil and gas properties to the three Packard Partners—Andrews Royalty, Inc., Gary J. Lamb and Jon M. Morgan, appellees. The Bankruptcy Court later found that the order closing the case was inadvertent and entered an order dated August 30, 1995, vacating its prior order closing the case, granting Kenan's motion to reopen the case, and enjoining the Debtors from interfering with the Packard Partners' interest in the oil and gas properties.

The Debtor appealed the August 30, 1995 order reopening the case to the United States District Court for determination of whether a Chapter 11 case may be reopened to sell scheduled property of the Debtors that was not fully administered at the time of closing of the case notwithstanding 11 U.S.C. § 554(c), and whether the Bankruptcy Court erred in vacating the final decree. The District Court affirmed, and the Debtors' subsequent appeal to the Tenth Circuit Court of Appeals was dismissed as interlocutory.

After the case was reopened, Kenan filed an additional motion to approve a sale of certain oil and gas properties to the Packard Partners on March 6, 1997, in an attempt to correct any error that may have existed in the earlier August 18, 1993 sale, and to authorize the sale of properties inadvertently omitted from prior sale motion. The confirmed plan of reorganization did not require such an order approving sale; however, it gave the Bankruptcy Court authority to enter such an order. After an April 24, 1997 hearing, and despite the Debtors' objection to the conveyance and sale, the Bankruptcy Court found it necessary to enter a sale order so that the Packard Partners could acquire peaceful enjoyment of the properties purchased. It is this May 21, 1997 Order that is the subject of this appeal.

## II. Discussion

Debtors argue that the central issue before the Court on appeal is whether or not, pursuant to the statutory language of 11 U.S.C. § 554(c), all of the oil and gas properties of the estate were abandoned to them upon the closing of the case. Debtors also argue the Bankruptcy Court made several errors in the Findings of Fact and Conclusions of Law that it included in its August 30, 1995 order reopening the bankruptcy case and vacating its prior order closing the case. However, in an earlier appeal by the Debtors, this order was affirmed by the United States Court, and their further appeal to the Tenth Circuit Court of Appeals was dismissed as interlocutory.

We find that the law of the case doctrine should be applied to limit our review to issues not previously decided by the District Court. The doctrine is "'restriction self-imposed by the courts in the interest of judicial efficiency. It is a rule based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued reargument of issues decided.'" Anthony v. Baker, 955 F.2d 1395, 1397 n. 1 (10th Cir. 1992) (quoting Fox v. Mazda Corp. of America, 868 F.2d 1190, 1194 (10th Cir. 1989) (citations omitted)). Issues decided on appeal become the law of the case and are to be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." White v. Murtha, 377 F.2d 428, 431-32 (5th Cir.), reh'g denied, 381 F.2d 34 (5th Cir. 1967). Although application of the law of the case doctrine is discretionary, we find that it should be applied in this case. None of the exceptions listed above are applicable, and the

Debtors will still be able to appeal to the Tenth Circuit when the appeal is no longer interlocutory.

Because we are not reviewing the August 30, 1995 ruling, the Debtors' arguments that allege errors in it will not be considered. Those arguments are: that § 105(a) of the Bankruptcy Code should not be construed to circumvent the plain language of § 554(c); that the Bankruptcy Court erroneously concluded that Debtors' actions constituted misconduct within the meaning of Federal Rule of Civil Procedure 60; that the Bankruptcy Court erroneously concluded that the Packard Partners were bona fide purchasers for value; that the Bankruptcy Court erroneously concluded that any errors in the descriptions of oil and gas properties are harmless errors; that equitable doctrines barred Kenan's March 6, 1997 motion to sell the oil and gas properties;[1] and that the Bankruptcy Court erroneously concluded that the closing of these Chapter 11 proceedings was due to inadvertence or excusable neglect. Likewise, Debtors' arguments regarding whether or not,

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[1]Debtors argue that Kenan's motion to sell oil and gas properties was barred by the doctrines of laches and/or estoppel. In support of this argument, the Debtors point to the fact that it took Kenan nearly two years after the Debtors began arguing that the properties were abandoned to them, to move to reopen this case. Debtors also assert that from September 1993 to July 1995, many producers of oil and gas properties determined that the Bankruptcy Court's August 18, 1993 order of sale was void for lack of jurisdiction, and returned production revenues to the Debtors. The Bankruptcy Court's May 21, 1997 Order does not rule on the laches and/or estoppel argument. The argument really goes to the August 30, 1995 ruling.

pursuant to the statutory language of 11 U.S.C. § 554(c),[2] all of the oil and gas properties of the estate were abandoned to the Debtors upon closing of the case, will need to be addressed on appeal to the Tenth Circuit. As the case stands right now, the order closing the case has been vacated; thus, without a review of whether or not the vacating of the order was proper, the arguments regarding abandonment cannot be addressed.

The remaining issues are: (1) whether disallowing the Debtors' request to bid during the April 24, 1997 sale of the properties of their estate violated due process; (2) whether the Trustee's March 6, 1997 motion to approve sale was void because he did not have the requisite bond in place, and therefore, did not qualify as a trustee; and (3) whether the Bankruptcy Court erroneously construed its August 19, 1987 order of abandonment. We review the Bankruptcy Court's conclusions of law de novo. Tulsa Energy, Inc. v. KPL Prod. Co. (In re Tulsa Energy, Inc.), 111 F.3d 88, 89 (10th Cir. 1997).

**(1) Disallowing the Debtors' request to bid during the April 24, 1997 sale of the properties of their estate did not violate due process.**

The Debtors argue that the Bankruptcy Court's May 21, 1997 Order violates due process by disallowing Debtors the opportunity to bid during the sale of their oil and gas properties pursuant to 11 U.S.C. § 363. The Debtors did not express a desire to bid on the properties, either by filing a motion

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[2] 11 U.S.C. § 554(c) provides that "[u]nless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title."

or in response to Kenan's motion to sell. Instead, they first raised the issue at the sale hearing, after the Bankruptcy Court ruled on the motion to sell.

In this case, Kenan sought approval of the sale under § 363 even though the confirmed plan of reorganization did not require an auction or a court order to sell the properties. The Debtors participated in the confirmation process and are bound by the terms of the confirmed plan. There may be concerns where a party seeks to liquidate substantial assets of the estate prior to confirmation pursuant to § 363.

See In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 982 (Bankr. N.D.N.Y. 1988) (citations omitted) (noting that § 363 does not "'authorize a debtor and the bankruptcy court "to short circuit the requirements of a reorganization plan by establishing the terms of the plan sub rosa in connection" with a proposed transaction'" (quoting Institutional Creditors v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 700 F.2d 935, 940 (5th Cir. 1983))); 3 Collier on Bankruptcy ¶ 363.02[4], at 363-19 (Lawrence P. King ed., 15th ed. Rev. 1997) (stating that "[b]ecause there is some danger that a section 363 sale might deprive parties of substantial rights inherent in the plan confirmation process, sales of substantial portions of a debtor's assets under section 363 must be scrutinized closely by the court"). Here, however, the case went through the Plan confirmation process, and the confirmed plan gave Kenan the authority to sell the assets in question. In addition, Kenan sought approval under § 363. Thus, the Debtors were afforded the safeguards of the confirmation process in addition to the notices provided by § 363. See Copy Crafters Quickprint, 92 B.R. at 983 (noting that notice of a pre-confirmation transaction under § 363(b) serves as a substitute for the safeguards of disclosure, voting, acceptance and confirmation were it instead part of a Chapter 11 plan). Debtors clearly had adequate notice and the

opportunity to be heard. They waited until the Bankruptcy Court had ruled on the second motion to sell before voicing a desire to bid on the property. The Bankruptcy Court's refusal to entertain this request at this stage of the proceeding did not deprive the Debtors of due process.

**(2) The Trustee's March 6, 1997 motion to approve sale was not void for failure to have the requisite bond in place.**

Debtors argue that the Bankruptcy Court erred in determining that Kenan qualified as a trustee without having posted the requisite bond pursuant to 11 U.S.C. § 322. Section 322 provides that:

> Except as provided in subsection (b)(1), a person selected under section . . .1104. . .of this title to service as trustee in a case under this title qualified if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.

11 U.S.C. § 322(a). Debtors argue that Kenan was required to file a bond within five days of the order reopening this case. Kenan argues that he was not "selected under section . . .1104," as stated in § 322, but rather was named in the plan of reorganization and approved by the creditors and interest holders. The Bankruptcy Court, citing § 1141 of the Bankruptcy Code, held that a bond was not required because the plan had been confirmed and the plan did not provide for a bond.

Section 1141(a) declares that "the provisions of a confirmed plan bind the debtor," among others, so the Debtors are bound by the terms of the confirmed plan that authorized Kenan to conduct the sale and did not make his authority THE

ontingent on having a bond in place. Even if Kenan was required to be bonded under other provisions of the Code, cases addressing § 322 have held that actions taken by trustees who failed to have the requisite bond in place were nevertheless valid. See W.J. Servs., Inc. v. Commercial State Bank, 990 F.2d 233, 234 (5th Cir.), cert. denied, 510 U.S. 948 (1993); Varalli v. PTL Intermodal (In re Metro Shippers, Inc.), 95 B.R. 366, 370 n. 5 (Bankr. E.D. Pa. 1989) (noting that although § 322 requires a trustee to post a bond in order to qualify as trustee, courts have long held that trustees' actions prior to posting a bond are valid); In re Holiday Isles, Ltd., 29 B.R. 827, 829 (Bankr. S.D. Fla. 1983) (stating that "[c]ourts faced with a trustee's failure to technically qualify have long recognized the concept of a 'de facto' trustee of a bankrupt estate"); In the Matter of Upright, 1 B.R. 694, 698 (Bankr. N.D.N.Y. 1979). Both § 1141(a) and the above-cited cases convince us that Kenan's motion to approve sale was not invalid for failure to have a bond in place.

**(3) The Bankruptcy Court did not erroneously construe its August 19, 1987 order of abandonment.**

In its oral findings of fact and conclusions of law made at the April 24, 1997 hearing, the Bankruptcy Court ruled that its prior abandonment order only included any causes of action the Debtors may have had against the corporations, and did not include any oil and gas properties. See Appellants' Appendix of Record. Tab 3 at p. 116. Debtors argue that the causes of action accrued as a result of oil and gas properties having been withheld from Maurice Woods by the probate estate. Thus Debtors argue that they obtained these properties as a result of the causes of action. However, if the Debtors did receive properties as a result of the causes of action, they failed to produce any evidence as to which properties they received and when they received them.

The Transcript of the April 24, 1997 proceedings, at pages 98-100, reads as follows:

> THE COURT: Well, are you saying then some of the property that he [Trustee] now seeks to sell were acquired as a result of a claim he brought against Southwest?
>
> MR. WOODS: No. He abandoned that claim against Southwest, and they were acquired as a result of the Woods further activities outside the bankruptcy estate after his abandonment.
>
> THE COURT: They were acquired ——
>
> MR. WOODS: Right. The Woods—after the abandonment the Woods went to Southwest Petroleum and apparently at some point moved to get the mineral deeds.
>
> THE COURT: Now, what specific properties are we talking about?
>
> MR. WOODS: Judge, we are talking about the Southeast Quarter of Section 10, Stephens County, Oklahoma, Southeast Quarter of Section 15, of Lincoln County Oklahoma, the Northeast Quarter of Section 22, Lincoln County, Oklahoma, Northwest Quarter of Section 23, Lincoln County, Oklahoma, and a great deal of properties in Andrews County in the state of Texas, Sections 15, 16, 17, 14, 5, 20, 21. There's a bunch of them here that's attached to this exhibit.
>
> THE COURT: What proof is there in the record of where those interests, how they came into the estate?

MR. WOODS: The proof would be under the fact that there was a recognized cause of action against Southwest Petroleum, and Mr. Kenan recognized that cause of action.

THE COURT: Then, did these properties come from Southwest to someone?

MR. WOODS: Yes. They were to come from Southwest to Mr. Woods. They never did; thus, creating the cause of action, which he then abandoned.

THE COURT: All right. Who has title to these properties now?

MR. WOODS: I don't know.

THE COURT: Well are you—-

MR. WOODS: Right. If the estate had any type. We contend the estate didn't have any after he abandoned them.

THE COURT: But see, what I don't know from this record if they came to the estate as a result of some claim against Southwest or came from some other source.

MR. WOODS: It would have been — the claim would have been in the nature of a lawsuit against Southwest..

THE COURT: Did anyone ever sue Southwest?

MR. WOODS: No, they agreed, I believe, to go ahead and transfer the properties.

THE COURT: You see, there's no — I don't have any

evidence.

MR. WOODS: I think there was some testimony from 1995 on this.

THE COURT: Well, I don't remember any 1995 testimony.

MR. WOODS: That's when, I think, Mrs. Woods took the stand and testified as to those. I'd have to check the record and give you exactly what occurred then.

THE COURT: All right. Well, go ahead.:

The Bankruptcy Court found that the Debtors failed to produce evidence of any properties obtained as a result of the abandoned causes of action. The Bankruptcy Court's finding is not clearly erroneous.

Based on the foregoing, we conclude that the decision of the Bankruptcy Court should be AFFIRMED.

## APPENDIX E

## UNITED STATES BANKRUPTCY COURT
## WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| IN RE: MAURICE G. WOODS and TERESA J. WOODS, | | BK-84-03759-A |
| Debtors. | | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 22, 1995 the court heard the motion to reopen this case filed by Thomas J. Kenan, the trustee.

Appearing at the hearing were Thomas J. Kenan, representing himself in his capacity of trustee and Kenneth L. Spears, representing Maurice G. and Teresa J. Woods, the debtors who were also present in persons. Also present at the hearing was Gary Lamb, one of the three partners of the Packard Partners who earlier had purchased the oil and gas properties of the estate. Mr. Lamb testified as a witness for the trustee. Teresa Woods testified as a witness for the debtors.

Based upon the pleadings, the testimony of the witnesses, the evidence introduced at the hearing, earlier orders and matters in this case, of which I take judicial notice, and the arguments of counsel, I make the following findings of fact and draw the following conclusions of law:

## FINDINGS OF FACT

1. The debtors filed their chapter 11 petition in

December, 1984. In may, 1987 the trustee was appointed.

2. In July 1991 the plan of reorganization was confirmed. The plan provided that the trustee was to administer the plan. The plan, essentially, provided that the trustee was to continue to pursue the business of the estate until such time as he deemed further efforts no longer justified. At this point he was to sell the oil and gas properties and use the proceeds to pay administrative expenses and make a final payment to the persons with allowed claims. The business of the estate was an effort to bring value to a contract for the sale of electricity to Oklahoma Gas and Electric Company with Waste Systems, Inc., most of whose capital stock was an asset of the estate.

3. By April, 1993 the trustee had determined that it was no longer prudent to continue the business of the estate. On April 21, 1993 he filed a Motion to Approve Sale of Oil and Gas Properties.

4. Coincidentally, on May 6, 1993, this case came on for hearing at a routine disposition docket. The trustee reported to the court that a motion to approve a sale of the oil and gas properties of the estate was set for an early hearing, and that the sale of such properties and distribution of the funds would complete the administration of the estate. The Court requested the trustee to file his final report and application for final decree at his earliest convenience.

5. On May 13, 1993, the trustee filed his Chapter 11 Final Report and Application for Final Decree.

6. Before the hearing on approval of the sale of the oil and gas properties, the trustee apparently was approached by other persons who expressed an interest in buying the assets. Stating that he wished to obtain the highest possible value for

the properties the trustee requested that the motion be continued to a later date.

7. On June 3, 1993, the court entered the Final Decree, ordering that the estate had been fully administered and the trustee was discharged and the case was closed.

8. On July 15, 1993, the trustee filed his "Trustee's Further Description of Oil and Gas Properties," which referred to the earlier-filed Motion to Approve Sale and described more fully some of the oil and gas properties of the estate. Some of the oil and gas properties were never more fully described than as "all other properties" of the estate in certain specified counties.

9. On August 18, 1993, after a hearing attended by Maurice G. Woods and at which his attorney appeared and objected, but not on the ground that the case had been closed, this court entered its Order approving the sale of the oil and gas properties described as those properties of the estate described in the trustee's motion filed April 21, 1993, and further described in the trustee's description of properties filed on July 15, 1993.

10. The Oil and gas properties of the estate were sold for $72,000 to three persons, Gary J. Lamb of Midland, Texas; John M. Morgan of Midland, Texas; and Andrews Royalty, Inc. of Dallas, Texas. They operate as a partnership known as the "Packard Partners."

11. The trustee next proceeded to draft conveyances of the many oil and gas properties of the estate. Almost all of these properties were small fractional interests located in several counties in Texas and Oklahoma. Numerous documents were prepared, executed and delivered to the Packard Partners. In

some instances, the notary public acknowledging the signature of the trustee failed to state the date of the acknowledgment. This failure was not detected by the trustee, the Packard Partners, or the recording clerks, and all such documents apparently were recorded in the counties where the properties were located.

12. Soon after the transfer the debtors began corresponding with some of the purchasers of production from certain of the wells that were the subject of the transfers. Their assertion was that the Motion to Approve Sale and Trustee's Further Description of Oil and Gas Properties had omitted to specifically describe some of the oil and gas properties of the estate, that such properties were transferred improperly, and that the properties had reverted to the debtors by operation of law. The effect of these letters apparently was not only to cause some of the purchasers of production from these wells to place into suspense payments from these wells but also, in some instances, to place into suspense all payments to the Packard Partners relating to any transfers made to them by the trustee.

13. Some time later, the debtors began to assert that all transfers made by the trustee to the Packard Partners through documents in which the notary public's acknowledgment was undated were incapable of transferring any properties and that such properties would have reverted to the them by operation of law. Apparently, some purchasers of production from these wells commenced placing into suspense any payments relating to these wells.

14. In July, 1995 the Packard Partners notified the trustee that Maurice Woods had written least two purchasers of production, contending that no transfers from the trustee to the Packard Partners were valid because the Final Decree closing the case had been entered on June 3, 1993, a date prior to the

Court's Order of August 18, 1993, approving the sale of the oil and gas properties. It appears now, at the time of hearing this motion to reopen the case, that the purchasers of production from virtually all oil and gas properties purchased by the Packard Partners could suspend any payments from such production until such time as the ownership issues are resolved.

15. This chapter 11 case has been administered for a very long time primarily because of the attempts of the trustee to bring value to the contract for the sale of electricity to Oklahoma Gas and Electric Company, which required an agreement with a municipality for the burning of municipal solid wastes. In spite of diligent efforts the trustee was not able to accomplish this business goal, and so the case continued for an unusually long period of time.

16. Closing of the case occurred when there was an administrative effort by the Assistant United States Trustee's office, the Clerk, and others to close old cases. Perhaps this case got caught up in that effort. In any event, the case was closed and a final decree was entered before all the formalities concerning the sale of the oil and gas properties to the Packard Partners had been completed.

17. If closing the case was premature it was due to inadvertence or excusable neglect which warrant vacation of the order closing the case.

18. The purchasers of the oil and gas properties, Gary J. Lamb, John M. Morgan, and Andrews Royalty, Inc., known as the Packard Partners, purchased the oil and gas properties for $72,000 in good faith and they are bona fide purchasers who acted in reliance upon the orders of the courts of the United States.

19. The actions of the debtors in attempting to upset

the rights of the bona fide purchasers constitute misconduct.

20. It would be unjust and inequitable if, somehow, the debtors were to retain these valuable oil and gas properties at the expense of the good faith purchasers. Such would be an absolute, total windfall to them, totally contrary to all concepts or principles of equity.

21. Any errors in the descriptions of the oil and gas properties and any errors in the acknowledgments of the conveyances to the Packard Partners, are harmless errors.

## CONCLUSIONS OF LAW

1. There are three statutes and two rules which appear to control the decision. The first statute is, of course, Section 350 of Title 11, which provides that bankruptcy cases may be reopened. Section 350(b) provides that a case may be reopened to administer assets or "for other cause." Such language is an example of a discreet statute speaking in broad, general terms of otherwise undefined "cause". See In re Horwitz, , 167 B.R. 237 (Bankr.W.D.Okla. 1994).

2. Another statute that bears on the issues is Section 554(c) of Title 11 which, in pertinent part, provides that "[u]nless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title." It is this statute that forms the basis of the debtors' argument that the oil and gas properties reverted to them when the order was entered closing the case. Important, however, is the language in the statute providing "unless the court orders otherwise." Again, this is an example of a discreet statute placing a great deal of discretion in the court. The language of the statute is open-

ended and contains no absolute rule. It is for the court to fashion a remedy based upon all the circumstances and equities of the case.

3. The third statute is Section 105(a) of Title 11, which is addressed to the authority of the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Again, this statute is discreet and invokes the discretion of the court to do what is necessary based upon the facts of the particular case.

4. One of the rules that comes into play here is Rule 9005 Fed.R.Bankr.P. which applies Rule 61 Fed.R.Civ.P., dealing with harmless error. This rule provides that, when appropriate, a bankruptcy court may order the correction of any error or defect or the cure of any omission which does not affect substantial rights. The other Rule that is relevant is Rule 9024 F.R.Bankr.P. which applies Rule 60 F.R.Civ.P. It provides for relief from judgments or orders for numerous specified reasons. Bankruptcy Rule 9024, provides among other exceptions, that motions to reopen bankruptcy cases are not subject to the one year limitation contained in Civil Rule 60(b).

5. In looking at the interplay between Sections 350 and 554(c), I note that Section 554(c) provides that, "unless the court orders otherwise" scheduled property not otherwise administered at the time of the closing of the case is abandoned to the debtor. Not only should effect be given to the words "unless the court orders otherwise," but all provisions of the Bankruptcy Code must be construed in a manner to give effect to, and make the most the Code a coherent being. The debtors would have this court construe section 554(c) absolutely and in a manner to make the discretionary provisions of section 350(b) ineffective.

Closing a case is basically a matter of administration allowing the clerk to close the files and ship them off to the archives.

The provision of section 554 providing for abandonment of assets that have not been administered is to remove properties of inconsequential value from the estate so it can be finally closed. Such is not the case here for the assets were administered when the trustee sold them.

6. Here, additionally equity requires that the case be reopened so any doubt concerning the sale may be removed and to allow the purchasers to obtain legal title. The case was closed and the final decree entered before all of the technical matters had occurred concerning the sale. It would be a unjust and inequitable to say that the "housekeeping" language of section 554(c) divested the bona fide purchasers of the fruits of their successful bid.

7. Therefore, on the authority of these provisions of the Bankruptcy Code and Rules, I have the authority to reopen this case. Further, the earlier order of June 3, 1993 closing the case and entering the final decree should be vacated and annulled.

8. This reopening of the case and providing relief from the earlier order is based partly upon the misconduct of the debtors in attempting to upset the rights of the bona fide purchasers, the Packard Partners, which misconduct additionally authorizes reopening, as provided in Rule 60(b), F.R.Civ.P. Further, as provided in Rule 60(b), there are other reasons justifying this relief, such as the mistake, inadvertence, or excusable neglect of the trustee, the principles of equity, and especially the windfall to the debtors that would occur.

9. Section 105(a) of the Bankruptcy Code also applies here and would require this result in order to protect the validity of the sale of the properties and the rights of the bona fide purchaser.

I conclude that reopening this case and taking the other actions to be set forth in this order are necessary and appropriate to carry out the provisions of the Bankruptcy Code, to implement the orders of this court and to prevent abuse of process. Section 105(a) is seldomly used and, when used, is employed sparingly, especially by this court. But I conclude its use particularly appropriate here.

If this case is not reopened and the order set forth herein should not be issued, the whole process of selling assets of bankruptcy estates would be upset. Allowing debtors to upset valid sales of estate assets on grounds such as asserted here would obviously have a chilling effect on future bankruptcy sales.

10. The facts and circumstances of this case further require that the court employ section 105(a) to assure that the purchasers right of quite enjoyment of their property is not disturbed in the future; and that the trustee and purchasers be provided an accounting of the proceeds from the sale of oil and gas from these properties since the case was commenced.

Accordingly, the case will be reopened and the earlier order closing the case vacated; the debtors will be enjoined from interfering with the quiet enjoyment of the purchasers; will be required to provide an accounting; and the purchasers will, likewise, be required to provide an accounting as confirmation.

Dated: August 30, 1995

By the court.

_____

Richard L. Bohanon
United States Bankruptcy Judge

**APPENDIX F**

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| MAURICE G. WOODS AND | ) | Case No. 84-03759-A |
| TERESA J WOODS, | ) | (Chapter 11) |
| | ) | |
| Debtors. | ) | |

## PLAN OF REORGANIZATION

The following Plan of Reorganization ("Plan") is proposed by Thomas J. Kenan, the court-appointed trustee ("the Trustee") for the chapter 11 estate of Maurice G. Woods and Teresa J. Woods ("the Debtors"). The Trustee is sometimes referred to herein as "the Proponent" of the Plan.

### ARTICLE I

### DEFINITIONS

For the purposes of the Plan, the following terms shall have the respective meanings hereinafter set forth.

1.1 "Acceptance" as used herein is defined in Section 1126 of the Bankruptcy Code. A Class of Claims has accepted this Plan if the Plan has been accepted by Claimants of that Class that hold at lease two-thirds in dollar amount and a majority in number of the Allowed Claims of such class which vote either to accept or to reject the Plan.

1.2 "Administrative Expense" shall mean those expenses of the Debtors' chapter 11 case allowed pursuant to Section 503 of the Bankruptcy Code.

or examine any Claim shall not be deemed to be a waiver

1.3 "Allowed Amount" is the amount of any Claim allowed by Final Order of the Bankruptcy Court, including applicable post-petition interest accrued thereon.

1.4 "Allowed Claim" shall mean (a) a Claim that has been allowed by Final Order of the Bankruptcy Court; (b) a Claim timely filed with the clerk of the Bankruptcy Court or scheduled as liquidated, undisputed and non-contingent by the Debtors in their respective schedules, lists and statements of financial affairs and executory contracts heretofore filed with the Bankruptcy Court as they may be amended or supplemented (hereinafter referred to as the "Schedules"), as to which Claim no objection to the allowance thereof has been imposed within the period of time fixed by the Bankruptcy Code, by the Bankruptcy Rules or by a final order of the Bankruptcy Court, as to which Claim either an objection to the Claim or an application to amend the schedules with respect to a scheduled Claim has resulted in the allowance of a Claim, in whole or in part, by a final order of the Bankruptcy Court.

1.5 "Bankruptcy Court" is the United States Bankruptcy Court for the Western District of Oklahoma having jurisdiction over the chapter 11 reorganization case, or the United States District Court for the Western District of Oklahoma sitting as the Court of Bankruptcy, or a magistrate duly and lawfully appointed by the Chief United States District Judge for the Western District of Oklahoma sitting as the Court of Bankruptcy, or a magistrate duly and lawfully appointed by the Chief United States District Judge for the Western District of Oklahoma to hear matters in these proceedings.

1.7 "Claim" or "Claims" shall have the meaning set forth in § 101(4) of the Bankruptcy Code.

1.8 "Claimant" shall mean the holder of a Claim.

1.9 "Class" shall mean a category of holders of Claims or interests which are substantially similar to the other Claims or interests in such category.

1.10 "Confirmation" shall mean the entry by the

Bankruptcy Court of an order confirming this Plan of Reorganization.

1.11 "Confirmation Date" shall mean the date of the entry of the Confirmation Order by the Bankruptcy Court confirming the Plan of Reorganization.

1.12 "Confirmation Order" shall mean the order entered by the Bankruptcy Court confirming the Plan.

1.13 "Consummation of the Plan" shall mean the performance by the Trustee of all material obligations provided for in the Plan.

1.14 "Creditors" shall mean holders of claims against the Debtor.

1.15 "Debtors" are Maurice G. Woods and Teresa J. Woods, as Debtors in the above-styled and numbered chapter 11 reorganization case.

1.16 "Effective Date" or "Effective Date of the Plan" shall mean as soon as practical after the Confirmation Order becomes a Final Order.

1.17 "FDIC" is the Federal Deposit Insurance Corporation.

1.18 "Final Order" shall mean an order of the Bankruptcy Court which has not been reversed, stayed, modified or amended and the time to appeal from or to seek review or rehearing of such order shall have expired and which shall have become final in accordance with the Rules of Procedure in Bankruptcy and the local bankruptcy rules.

1.19 "Petition Date" shall mean December 17, 1984, the date the voluntary chapter 11 petition was filed by the Debtors in this case.

1.20 "Plan" shall mean this Plan of Reorganization, all exhibits and schedules attached to it and referred to in it, and any modifications to it approved by the Bankruptcy Court.

1.21 "Pro-rata" is the same proportion that a Claim or an interest in a particular Class bears to the aggregate amount of all Allowed Claims or the aggregate number of allowed object

interests in such Class.

1.22 "Schedules" shall mean the schedules and statement of affairs filed by the Debtors as supplemented and amended.

1.23 "Secured Creditor" shall mean the holder of a Claim secured by a lien or property in which the estate has an interest.

1.24 "Unsecured Creditor" shall mean the holder of a Claim or that portion of a Claim for which no collateral exists or is pledged to the holder of such Claim as security therefor.

## ARTICLE II

## INTRODUCTION

2.1 Maurice G. Woods and Teresa J. Woods are husband and wife.

2.2 The principal occupation of Maurice G. Woods is the promotion of the sale of solid waste disposal incinerators to governmental units or private enterprise through a corporation, Waste Systems, Inc., most of the corporate stock of which is an asset of the Debtors' estate. Waste Systems, Inc.'s assets consist of patents, patent applications, and a contract with Oklahoma Gas & Electric Company that could have value if it could be enforced in connection with a waste-to-energy solid waste disposal incinerator built and operated within Oklahoma Gas & Electric Company's service area.

2.3 The principal occupation of Teresa J. Woods is the brokering of beef jerky products through a corporation, Kwik Snax, Inc., the capital stock of which is an asset of the estate. The Trustee considers the value of the capital stock of Kwik Snax, Inc. to be entirely dependent upon the ongoing efforts of Teresa J. Woods. This Plan abandons such capital stock to the Debtors.

2.4 Valuable assets of the estate consist of various producing and non-producing oil and gas mineral interests and overriding royalty interests ("the Oil and Gas Properties").

## ARTICLE III

## CONCEPT OF THE PLAN

3.1 The Trustee on the Effective Date of the Plan (i) shall pay all accrued and Allowed Administrative Expenses, (ii) shall pay all allowed priority tax Claims against the estate, to the extent cash is available, (iii) shall leave unaltered the legal, equitable, and contractual rights to which each Secured Creditor's Claim entitles the holder of such Claim, (iv) shall continue to collect the assets of the estate or put into cash form the assets of the estate, (v) to the extent cash is available and after provision is made for payment in full of all Allowed Administrative Expenses and all Allowed priority tax claims, shall distribute to the Unsecured Creditors each such creditor's Pro-Rata share of such available cash, reserving therefrom only sufficient cash to provide for the future anticipated costs of carrying out the provisions of the Plan, and (vii) should assets remain, after payment of all Allowed Administrative Expenses, priority tax Claims and Unsecured Claims, shall transfer such remaining assets to the Debtors.

## ARTICLE IV

## ADMINISTRATIVE EXPENSE CREDITORS

4.1 The Administrative Expenses of the Debtors' chapter 11 case shall be paid in full, in cash, on the Effective Date or as soon thereafter as they become Allowed, unless the holder of any such an Allowed Claim and the Trustee agree on

a different method of payment.

## ARTICLE V
## DIVISION OF HOLDERS OF CLAIMS AND INTERESTS INTO CLASSES

5.1 The holders of Claims against and interests in the Debtors are divided into the following Classes:

Class - Administrative Expense Claimants

Class 2 - Tax Claimants entitled to priority under 11 U.S.C. 507(a)(7).

Class 3 - The holders of Secured Claims, which Claims are secured by liens on household furniture and fixtures in the Debtors' residence.

Class 4 - The holders of Unsecured Claims

Class 5 - The Debtors

## ARTICLE VI

## IMPAIRMENT OF CLAIMS AND INTERESTS

6.1 Holders of Claims and interests in Classes 2, 4 and 5 are impaired.

6.2 Holders of Claims in Classes 1 and 3 are unimpaired.

## ARTICLE VII

## PROVISION FOR TREATMENT OF CLASSES OF HOLDERS OF CLAIMS AND INTERESTS IN THE DEBTORS

7.1 Each Class of holders of Claims or interests shall be treated as follows:

7.1.1 The holders of Claims in Class 1 shall be paid in full, in cash, to the full extent of the Allowed Amount of their Claims on the Effective Date of the Plan.

7.1.2 Each holder of an Allowed Claim in Class 2 shall be paid, to the extent cash is available after payment of Class 1 Claims and in excess of that amount allowed to be retained by the Trustee under Article 10.2 hereof, in full, in cash, in the Allowed Amount of their Claims on the Effective Date of the Plan and the balance when funds therefor become available, should they become available.

7.1.3 Each holder of an Allowed Claim in Class 3 shall be left unaltered the legal, equitable and contractual rights to which its claim entitles the holder of such Claim.

7.1.4 Each holder of an allowed claim in Class 4 shall share Pro-Rata with other holders of Allowed Claims in this Class in all distributions made by the Trustee of assets of the estate, after provision has been made for all Allowed Administrative Expenses and all Allowed priority tax claims and for payment of the future anticipated costs of carrying out the provisions of the Plan as described at Article 10.2 hereof.

7.1.5 The assets of the estate after payment of all Allowed Claims in Classes 1, 2, and 4.

## ARTICLE VIII

## MODIFICATION OF THE PLAN

8.1 The Proponent may amend or modify this Plan at any time prior to Confirmation. After confirmation, the Proponent may modify this Plan only with the approval of the Court and before substantial consummation of the Plan, and may take such steps as are necessary to carry out the purposes and effect of the Plan.

## IX

## PROVISIONS FOR ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

9.1 In accordance with the provisions of Sections 11239b)(2) and 365 of the Bankruptcy Code, the Trustee hereby rejects all executory contracts and unexpired leases to which the Debtors are parties and which were in existence on the Petition Date, except those executory contracts and unexpired leases listed on Exhibit "A" hereto. The Trustee reserves the right to expand the list of assumed executory contracts and unexpired leases on Exhibit A at any time prior to the Confirmation of the Plan.

9.2 The requirements set forth in § 365(b) (1) (A), (B) and (C) of the Bankruptcy Code shall be deemed to have been fully met, with respect to each assumed executory contract and each assumed lease, by the other provisions of this Plan dealing with the treatment of Class of Claims unless the party, other than the Trustee, to any such assumed contract or lease files a written objection to the Confirmation of the Plan, in which event the Confirmation Order will make provisions for any such requirements.

9.3 Any Allowed Claim resulting from the rejection of an unexpired lease or executory contract with the Debtors shall be treated as a Class 4 Claim.

## ARTICLE X

## PROVISIONS REGARDING PAYMENTS FOR SERVICES

10.1 No payments have been made or promised by the Trustee to any person for services or for costs and expenses in connection with this chapter 11 reorganization case or in or

connection with the Plan of Reorganization or incident to the chapter 11 reorganization case except those payments which have been disclosed to the Bankruptcy Court.

10.2 The Trustee is authorized to retain sufficient cash assets of the estates so as to be able at all time to provide for the payment of the future anticipated costs of carrying out the provisions of the Plan.

## ARTICLE XI

## PROVISIONS FOR RETENTION, ENFORCEMENT, SETTLEMENT OR ADJUSTMENT OF CLAIMS BELONGING TO THE DEBTORS

11.1 The Trustee shall retain all causes of action and rights of the Debtors including rights and powers of the Trustee and the Debtors-in-Possession against any parties whatsoever, including but not limited to, those causes of action granted pursuant to Sections 544, 547, 548 and 550 of the Bankruptcy Code.

## ARTICLE XII

## POST-CONFIRMATION DEBTORS

12.1 Upon Confirmation of the Plan, Thomas J. Kenan shall continue as Trustee for the following limited holders of interests in Class 5 shall receive any purposes:

12.1.1 To perform all acts reasonably necessary or appropriate to the Consummation of the Plan.

12.1.2 To object to Claims and conduct such proceedings in connection therewith as are reasonably necessary or appropriate.

12.1.3 To commence and continue such litigation as is deemed appropriate by the Post-Confirmation Trustee in against

connection with the Debtors' Chapter 11 estate arising under applicable law, including without limitation 11 U.S.C. Sections 544, 547-550 and 553.

12.2 All post-confirmation expenses of the Trustee shall be paid by the estate, and any assets recovered post-confirmation by the Trustee or coming into his possession in any manner as a result of the administration of this case shall become the property of the estate. Such expenses shall include compensation to the Trustee, any post-confirmation legal or accounting fees incurred by the Trustee, and any other post-confirmation expenses necessary to allow the Trustee to carry out his duties under the Plan.

## XIII

## RETENTION OF JURISDICTION

13.1 Until the case is closed, the Bankruptcy Court shall retain jurisdiction to insure that the purpose and intent of this Plan is carried out. The Bankruptcy Court shall retain jurisdiction to determine all Claims against the Debtors and to enforce all causes of action and Claims which may exist on behalf of the Debtors. Nothing herein contained shall prevent the Trustee from taking such action as may be necessary to enforce any Claim or cause of action which may exist on behalf of the Debtors (including, but not limited to claims and causes of actions arising under the Bankruptcy Code, including those contained in 11 U.S.C. Sections 544, 547-551, and 553) or bankruptcy causes of action which may not have been enforced or prosecuted previously.

13.2 The Bankruptcy Court will retain jurisdiction until this Plan has been fully consummated and until all holders of Claims have been paid in accordance with this Plan, including, but not limited to, the following purposes:

13.2.1 The classification of the holders of any Claims

of any right to object to or reexamine any such Claim in whole or in part.

13.2.2 Rejection or assumption of any executory contracts that are not discovered prior to the confirmation of the Plan and the allowance of any Claim for damages with respect to the rejection of any such executory contracts within such further time as the Court may direct.

13.2.3 Determination of all questions and disputes regarding title to the assets of the Debtors and the determination of all causes of action, controversies, disputes or conflicts, whether or not subject to pending actions as of the Confirmation Date, between the Trustee or Debtors and any other party including, but not limited to, any right of the Trustee or Debtors to recover assets pursuant to the provisions of the Bankruptcy Code.

13.2.4 The correction of any defect, the curing of any omission or the reconciliation of any inconsistency in this Plan or the Order of Confirmation with respect thereto, which may be necessary or helpful to carry out the purposes and intent of this Plan.

13.2.5 The modification of this plan after Confirmation.

13.2.6 To enforce and interpret the terms and conditions of this Plan.

13.2.7 To enter any order, including injunctions, necessary to enforce the title, rights and powers of the Debtors and to impose such limitations, restrictions, terms and conditions of such title, rights and powers as this Court may deem necessary.

13.2.8 To enter an order concluding and terminating this case.

## ARTICLE XIV

## LIENS

14.1 All liens securing Claims which are not allowed pursuant to the provisions of Section 502 and 506 of the Bankruptcy Code shall be invalidated and deemed null and void and of no further force and effect.

## ARTICLE XV

## INTEREST AND PENALTIES

15.1 No interest or penalties occurring after the Petition Date shall be paid on any Allowed Claim, nor shall any Creditor claiming any such interest or penalty be entitled to have its Claim for such interest or penalty allowed for payment pursuant to the Plan.

## ARTICLE XVI

## DISCHARGE OF DEBTORS

16.1 The confirmation of this Plan shall discharge the Debtors from any debt for which discharge is provided in Section 1141 of the Bankruptcy Code; provided, however, that such confirmation shall not discharge the Debtors from any debt they or either of them contracted after the Petition Date.

Respectfully submitted this 21st day of February 1991.

_____

Thomas J. Kenan, Trustee

Supreme Court, U.S.
FILED
AUG 20 1999
OFFICE OF THE CLERK

No. 99-229

In The

# Supreme Court of the United States

MAURICE G. WOODS and TERESA J. WOODS,

*Petitioners,*

v.

THOMAS J. KENAN, Trustee,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 20, 1999

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioners (the "Woods") have given no compelling reasons for this Court to grant their petition for a writ of certiorari.

### A. There are no conflicts in decisions of U.S. courts of appeals.

Petitioners cite no conflicts in decisions of U.S. courts of appeals. They refer to the Tenth Circuit's description of three different approaches taken by bankruptcy courts and bankruptcy appellate panels to the issue of whether and under what circumstances a technical abandonment of property is revocable in a bankruptcy case. Bankruptcy appellate panels are not U.S. courts of appeals. Rule 10(a) of the Supreme Court Rules refers to conflicts in decisions between U.S. courts of appeals.

### B. The decision of the Court of Appeals does not conflict with any relevant decision of this Court.

They cite no relevant decisions of this Court with which the decision of the Court of Appeals, Tenth Circuit is in conflict.

Of the nine cited cases of this Court, seven are cited for the rule concerning the interpretation of statutes known as the "plain meaning doctrine." Petition, pages 8 and 9. They argue that the Tenth Circuit failed to apply this rule, not that it changed the rule.

An eighth cited decision of this Court, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992) is said to

be a "relevant decision" with which the decision of the Court of Appeals, Tenth Circuit is in conflict. But *Taylor* involved an interpretation of 11 U.S.C. §521(1) and Bankruptcy Rule 4003(b) as they apply to exempt property. The case at hand involves the inadvertent closing of a chapter 11 case, the reopening of the case pursuant to 11 U.S.C. §350(b), the vacation of the earlier order closing the case pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b), and the effects of this on property technically abandoned to the debtors under 11 U.S.C. §554(c). *Taylor* is not a relevant decision of this Court for purposes of a petition for a writ of certiorari. It is only an application of the "plain meaning doctrine" in a bankruptcy case context.

The ninth cited decision of this Court, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963 (1988) is cited for the proposition that "whatever equitable powers remain with the bankruptcy courts must be exercised within the confines of the Bankruptcy Code." Petition at 14. Petitioners then argue that Fed. R. Civ. P. 60(b)(1) – which was relied upon by the Court of Appeals, Tenth Circuit as justification for the bankruptcy court's vacating its earlier order closing the case – is "inherently equitable in nature" and, as such, cannot be available to circumvent the specific legislative directive in 11 U.S.C. §554(c).

*Ahlers* is not a relevant decision that conflicts with the decision of the Court of Appeals, Tenth Circuit. *Ahlers* held that the "absolute priority rule," 11 U.S.C. §1129(b)(2)(B)(ii), itself provides that a "fair and equitable" reorganization plan is one that complies with the absolute priority rule. 485 U.S. at 207, 108 S.Ct. at 969. In *Ahlers*, indeed, this Court reached out to rationalize the

absolute priority rule with 11 U.S.C. §1126, which provides that it is up to the creditors – and not the courts – to accept or reject a reorganization plan that fails to provide them adequate protection or fails to honor the absolute priority rule. *Id.* at 485 U.S. 207, 108 S.Ct. 969.

The essential difficulty the Petitioners have had in this case is their myopic focus on 11 U.S.C. §554(c) and a refusal to interpret it in conjunction with other provisions of the Bankruptcy Code and the Federal Rules of Civil Procedure.

**C. The Court of Appeals has not decided an important question of federal law that has not been, but should be, settled by this Court.**

This case does not involve a decision of a U.S. court of appeals on an important question of federal law that has not been, but should be, settled by this Court. In fact, the Petitioners make no argument to this effect. They state no high public interest in this Court's settling whether a bankruptcy case can be reopened for reasons involving neglect and inadvertence by both the bankruptcy court and the trustee. They just state the proposition and let it go at that. Petition, page 1.

**D. The Petitioners only assert that the Court of Appeals misapplied a properly stated rule of law.**

The only reasons urged by the Petitioners for the granting of a writ of certiorari are their assertions that the Court of Appeals, Tenth Circuit *misapplied* a rule of statutory interpretation – the "plain meaning doctrine" – and

*misapplied* the rule that limits a bankruptcy court's exercise of equitable powers within the confines of the Bankruptcy Code. Even if correct, those are not compelling reasons for this Court to review the decision of the Court of Appeals, Tenth Circuit. No conflict in decisions of the courts of appeals would be resolved. No confusion or uncertainty would be eliminated concerning an important federal question caused by a U.S. court of appeals decision that conflicts with relevant decisions of this Court. No important, unsettled question of federal law would be settled. If the arguments of the Petitioners are to be believed, the Court of Appeals, Tenth Circuit just misapplied accepted law.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 20, 1999